IN THE SUPREME COURT OF FLORIDA

CASE NO. 56,811

McARTHUR BREEDLOVE,)
Appellant,)
vs.) MOTION FOR REHEARING
THE STATE OF FLORIDA,)
Appellee.)

The appellant, McArthur Breedlove, by and through undersigned counsel, moves this Court to grant rehearing in the above-styled cause, pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure. The issues raised on appeal and decided by this Court in its opinion dated March 4, 1982 will be addressed sequentially in this motion.

I

In the first point on appeal, appellant asserted a denial of due process stemming from the suppression by the prosecution of materially favorable evidence, specifically, a statement of his brother, Elijah Gibson, included in a police report. It was further asserted that this report and those of four other officers, all of which were signed or adopted by these officers (all of whom were listed in the discovery response filed by the prosecution), were discoverable under Rule 3.220(a)(1)(ii) of the Florida Rules of Criminal Procedure.

This Court rejected the due process claim, relying upon United States v. Agurs, 427 U.S. 97 (1976), as follows:

> . . . Breedlove has failed to demonstrate that the material contained in McElveen's report could not have been found through reasonably diligent preparation or that nonproduction of this report prejudiced him. Slip opinion at 3-4.

United States v. Agurs, supra, holds that the suppression of the material in the possession of the prosecution which is not specifically requested by an accused violates the Fourteenth Amendment if the "evidence is obviously of such substantial value

to the defense that elementary fairness requires it to be disclosed even without a specific request." 427 U.S. at 111. The standard established in that decision is whether the suppressed evidence "creates a reasonable doubt that did not otherwise exist." Id. at 112. As is noted in the decision of this Court, one other factor to be considered in such a situation is whether the suppressed evidence was available to an accused by other means of discovery. See, e.g. State v. Gillespie, 227 So.2d 550, 555 (Fla. 2d DCA 1969). The holding of this Court in this case is based both upon the materiality standards established in Agurs and this latter proposition of law.

With regard to the availability of the suppressed statement of Elijah Gibson, appellant submits that this Court overlooked or failed to consider the fact that trial counsel did depose Elijah Gibson prior to trial (Tr. 36-42), and that counsel, in the affidavits attached to the motion to relinquish jurisdiction filed during the pendency of this appeal, averred that they were not made aware of his pretrial statement as a result of the deposition or any other discovery in this case. Thus, the decision of this Court, holding that the pretrial statement of Gibson was nonetheless otherwise "available" to counsel, can only be interpreted as meaning that since this evidence apparently resided in the mind of Gibson -- but was not obtained from him by counsel -- the fact that counsel failed to elicit testimony from Gibson concerning a pretrial statement of which counsel was wholly unaware due to the suppression of that statement by the prosecution, somehow excuses that suppression and renders Brady v. Maryland, 373 U.S. 83 (1963) inapplicable. The same analysis would seemingly apply to the failure of counsel to elicit from the officer in whose report the statement is detailed, Detective McEleveen, evidence concerning the pretrial statement of Gibson.

The applicability of Brady cannot depend upon such

vagaries. The import of the decision of this Court is that Brady is satisfied if the prosecution merely discloses names of witnesses -- but not their favorable statements -- to an accused. This is clearly not the law. See Jacobs v. State, 357 So.2d 169 (Fla. 1978); Goldberg v. State, 351 So.2d 332 (Fla. 1977); Hernandez v. State, 348 So.2d 1224 (Fla. 3d DCA 1977). While the availability of witnesses to an accused is "a relevant consdieration" in a Brady violation situation, it is not "ordinarily determinative." United States ex rel. Meers v. Wilkins, 326 F.2d 135, 140 (2d Cir. 1964). The unrefuted facts in this case establish that counsel for appellant were not aware of the pretrial statement of Elijah Gibson, and the decision of this Court is silent as to how the statement was in fact otherwise available, save through disclosure by the State.

The second prong of the holding of this Court on this issue is that appellant failed to establish any prejudice from the nondisclosure. The opinion of the Court notes that Gibson told Detective McElveen that defendant had been at home at the approximate time of the homicide in this case, and that he had observed blood on the clothing of appellant, slip opinion at 2, but ignores perhaps the most critical aspect of the statement; that Gibson did not observe blood on the clothing of appellant until approximately 4:30 A.M., after appellant had left their home and returned again. Appellant, in his initial post-arrest statement, introduced by the State at trial, had explained that the blood which had been observed on his trousers had been the result of an unrelated physical altercation and not the incident in this case (Tr. 929). Thus, it is the combination of the time frame stated by Gibson and his observation of the bloodstains, in conjunction with the post-arrest statement of appellant, that establishes the favorable nature of his statement.

A recent decision of the Court of Appeals for the Fifth Circuit is instructive in this regard. In Sellers v. Estelle, 651 F.2d 1074, 1075 (5th Cir. 1981), the defendant was charged with and convicted of the murder of a police officer

during a burglary of a school building, and asserted a Brady violation due to the suppression of police reports which included statements of witnesses indicating that another individual had committed the offense, but that the defendant had voluntarily been at the scene at the time of the offense. The Court overturned a lower court finding that this evidence was not material under Agurs:

> The Magistrate concluded that the offense reports allegedly suppressed were not favorable to Sellers because they were inculpatory. As the Magistrate correctly noted, the offense reports were inculpatory to the extent that they placed the petitioner Sellers voluntarily at [the school] on the night that Officer Moody was killed. However, these reports were clearly exculpatory in that they indicated that another individual, Santos Cantera, not only was at the school that night, but admitted to others that he was the one who shot Officer Moody. . . .
>
> We find, then, that the suppressed reports were favorable to the petitioner with respect to the determination of his guilt. 651 F.2d at 1076-77 (citation omitted; original emphasis).

One interesting aspect of Sellers is that the Court reached this conclusion despite recognizing that the suppressed statements were probably not admissible, holding that "the evidence here suppressed was material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not." 651 F.2d at 1077 n.6. In this case, this Court overlooked the fact that the suppressed statement of Elijah Gibson would have been admissible; the prosecution introduced numerous statements of Gibson into evidence, and this Court, in disposing of the issue raised in Point III of the brief of appellant, held that these statements were properly introduced. Slip opinion at 7-9. It is fundamental that appellant was therefore entitled to introduce the totality of his statements. See, e.g. Nelson v. State, 362 So.2d 1017, 1020 (Fla. 3d DCA 1978); Ellison v. State 349 So.2d 731 (Fla. 3d DCA 1977); Elmore v. State, 291 So.2d 617 (Fla. 4th DCA 1974); 22A C.J.S. Criminal Law § 660(c). Thus, the suppressed statement

in this case is not only evidence which pointed to the innocence of appellant, it was admissible evidence. This Court accordingly erred in concluding that no violation of the Fourteenth Amendment is engendered by the suppression of that statement.

The second aspect of this issue is the claim of appellant that he was entitled to discovery of the police report of Detective McElveen, as well as those of four other police officers who were all listed as witnesses by the prosecution in its discovery response. This Court rejected this claim, holding that "police reports are not 'statements,' except of the officers making them", and that "generally they are not discoverable per se as statements of those officers." Slip opinion at 4 (citations omitted). One of the decisions cited by this Court for that proposition, State v. Dumas, 363 So.2d 568, 569 (Fla. 3d DCA 1978), cert. denied 372 So.2d 471 (Fla. 1979) holds precisely to the contrary:

> The primary issue presented for review centers around what types of police reports, if any, must be produced by the state on pre-trial discovery for the defendant in a criminal case. We hold that upon filing of a proper written demand for discovery by the defendant under Fla.R.Crim.p. 3.220(a)(1)(i) and (ii), the state is only required to produce the following particular types of police reports: (1) those police reports which are written and signed or otherwise adopted or approved by a person whose name has been furnished by the prosecutor to the defendant upon demand under Fla.R.Crim.P. 3.220(a)(1)(i), and (2) those police reports which contain a substantially verbatim recital of an oral statement which is (a) made by a person whose name has been furnished by the prosecutor to the defendant upon demand under Fla.R.Crim.P. 3.220(a)(1)(i), and (b) made to an officer or agent of the state who recorded such statement contemporaneously with the making thereof. . . . (footnote omitted).

Accordingly, the holding of this Court that "[t]he material in the instant reports does not comprise 'statements' because the reports have not been signed, adopted, or approved by the persons (other than the officers) to whom have been attributed", flies directly in the face of the Dumas holding. The decision mixes the two categories of discoverable "statements"

established in Dumas, and imposes part of the predicate for obtaining statements in the second category upon efforts to obtain statements in the first category. Both categories of "statements" are within the express language of Rule 3.220 (a)(1)(ii) of the Florida Rules of Criminal Procedure.

The other decisions cited by this Court in its decision do not undercut Dumas. In State v. Johnson, 284 So.2d 198, 200-01 (Fla. 1973), this Court considered only the proper use of police reports as impeachment evidence, and the disclosure requirements for such purposes. In State v. Latimore, supra, the Third District addressed only the discoverability of police reports which condense or summarize statements of other witnesses, not the police officers themselves. 284 So.2d at 424-25. In Miller v. State, 360 So.2d 46, 47 (Fla. 2d DCA 1978), the Court held only that reports of police officers who are witnesses to an offense or the victims thereof are discoverable, and did not address the remaining issues presented in Dumas. The only decision cited by this Court which is in even arguable conflict with Dumas is Lockhart v. State, 384 So.2d 289, 291 (Fla. 4th DCA 1980), which suggests some limitation on the right to obtain police reports but which nonetheless relies upon Dumas for its holdings.

This Court has not previously addressed the issue of the scope of proper discovery of police reports under Rule 3.220(a)(1)(ii) when the reports involved are signed or adopted by officers who, as the officers in this case, are listed by the prosecution in its discovery response pursuant to Rule 3.220 (a)(1)(i) of the Florida Rules of Criminal Procedure. While the language of the decision in this case certainly speaks to a limitation on the rule insofar as police reports are concerned, the reliance by this Court upon the Dumas decision in this case will undoubtedly create great uncertainty as to the meaning of the holding in this case among the bench and bar. Accordingly, rehearing is necessary to clarify the holding of this Court on this issue.

II

In his second point on appeal, appellant challenged the ruling of the trial court on his motion to suppress post-arrest statements on the ground that Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) and Michigan v. Mosley, 423 U.S. 96 (1975) required the suppression of the statement. After reciting the facts adduced at the suppression hearing, slip opinion at 5-6, this Court held as follows:

> Breedlove now claims that the statement, "eventually you will talk to us," was an implied threat constituting coercion and tainting the ensuing statement so that no proper waiver occurred. From the totality of the circumstances, it does not appear that the statement was coerced. Rather, Breedlove chose not to exercise his right to remain silent or to have counsel present, making the damaging statement after talking with his mother. The Judge properly concluded that he freely and voluntarily made the statement. Slip opinion at 6.

Appellant submits that this Court overlooked the essence of his claim regarding the post-arrest statement, which was not that his statement was coerced and inadmissible under the Fourteenth Amendment, but that the police officers had failed to "scrupulously honor" his invocation of his privilege against self-incrimination, thus rendering the subsequent statement inadmissible under the Fifth Amendment. It is fundamental that if the dictates of Mosley are not adhered to, and police officers seek to have an individual who has invoked the Fifth Amendment reconsider that invocation, any subsequent "waiver" of the privilege is invalid. Cribbs v. State, 378 So.2d 316, 319 (Fla. 1st DCA 1980); Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977).

The conflicts in the testimony presented at the suppression hearing which are addressed at some length by this Court in its decision are irrelevant to this claim. The testimony regarding the conversation upon which this issue is based is unrefuted. A violation of the Fifth Amendment privilege, as defined in Miranda and Mosley, is not dependent upon the use

or threatened use of force, but upon whether or not the right "'to cut off questioning' was fully respected in this case." Michigan v. Mosley, supra at 105. This Court made no factual or legal findings on this issue, and rehearing is necessary to address the claim raised by appellant.

III

In his third point on appeal, appellant contended that the trial court erred in admitting into evidence out-of-court statements of his mother and brother, who did not testify at trial, in the guise of non-hearsay ostensibly presented to demonstrate the state of mind of appellant at the time of his initial interrogation by police officers, and in denying a motion for mistrial based upon the assertion of the prosecutor in closing argument that these statements were in fact true. Error is asserted both under the common-law hearsay rule and under the Confrontation Clause of the Sixth Amendment.

This Court first found that the statements of the mother and brother were admissible as non-hearsay:

> At trial Detectives Ojeda and Zatrepalek testified regarding Breedlove's statement of the 21st. In relating what he said to them, both recited or alluded to the substance of a conversation they had with Breedlove's mother and brother. Neither the mother nor brother testified at trial, and Breedlove now claims improper introduction of hearsay and violation of the confrontation clause.
>
> * * *
>
> The court properly admitted the detective's testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. . . . Slip opinion at 8-9.

The decision cites no authority for the proposition that out-of-court statements of a nontestifying witness are admissible merely "to show the effect" on an accused, and no such authority exists. Rather, Florida law provides that out-

of-court statements which cause an accused to make statements in response thereto are admissible as non-hearsay. Brown v. State, 367 So.2d 616, 624 (Fla. 1979); McCumber v. State, 182 So.2d 627, 628 (Fla. 3d DCA 1966). For example, in Brown, a co-defendant was asked, in the presence of the defendant, if the defendant had been involved in a homicide; the co-defendant replied in the affirmative, and the defendant immediately confessed. 367 So.2d at 618. This Court held that the statement of the co-defendant was admissible as non-hearsay:

> . . . The principal issue at trial was the reliability of Brown's confession. The jolting effect produced by Simmon's accusation was the single circumstance explaining Brown's decision to confess, both negating inferences that Brown's confession resulted from police pressure and affirmatively suggesting that Brown confessed because his previous story would no longer be credited. The testimony as to the Brown-Simmons confrontation described a critical and plainly relevant operative fact, not hearsay. The testimony was, therefore, admissible. 367 So.2d at 624 (footnote omitted).

Despite the suggestion -- by the court and not by the prosecutor -- that the statements of the Gibsons were similarly admissible in this case (Tr. 933), the record clearly reflects, one of the interrogating officers himself testified, and the court itself admitted that the appellant had denied the truth of the most incriminating of these statements, and that the statements, for the most part, did not produce admissions from the appellant (Tr. 923-32, , 937, 1073). The following sidebar conference clearly illustrates the misapprehension under which the trial court was laboring:

> The Court: What was the basis of your side bar, please, Mr. Zenobi?
> Mr. Zenobi: First of all, the basis is that not only is everything he has been testifying to hearsay, but also, all of these witnesses are available. They are on the State's witness list.
> Secondly, the fact that even if the Court considers them not to be hearsay, when he was confronted with these statements, he denied them and nothing further was done with some of them.
> The Court: I know. (Tr. 932).

The Court then ruled that the jury would nonetheless be allowed to hear "what the defendant heard during the course of these conversations" (Tr. 933).

Thus, the trial court admitted these statements as non-hearsay, despite recognizing that appellant, when confronted with those statements, not only did not confess to the homicide, but denied the truth of the statements. This Court overlooked or failed to consider the total lack of record support for the ruling of the trial court, and additionally failed to address the constitutional aspect of this issue. Although recognizing the purpose of the Confrontation Clause in a hearsay context, slip opinion at 7, the decision in this case wholly disregards the constitutional predicate for the introduction of even properly-admitted hearsay: a demonstration by the prosecution that the out-of-court declarant is unavailable to testify. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2539 (1980); Barber v. Page, 390 U.S. 719, 724-25 (1968).

The final aspect of this issue is the argument of the prosecutor, in his closing argument to the jury, that the out-of-court statements of the Gibsons were in fact the truth (Tr. 1186-88). The decision in this case states that "[i]t appears that the prosecutor's remarks were improper", but holds that no reversible error occurred because counsel for appellant mentioned the Gibsons during his closing argument and "[i]t appears that defense counsel admitted that those statements were true." Slip opinion at 9-10. This holding is based upon an incorrect recitation of the actions of counsel for appellant at trial.

When the statements were first introduced, counsel for appellant advised the court that their duty to appellant required them to explore these statements on cross-examination, but that appellant was not waiving any objections to the introduction of the statements (Tr. 946-48). The opinion of the Court states that counsel advised the court that they "would go into the Gibson's statements because they had been received for an impermissible purpose", slip opinion at 8: that charac-

t rization is misleading:

> Mr. Zenobi: I would like to bring to the attention of this Court numerous hearsay objections to the testimony of Elijah Gibson. We had no intention of raising any of that testimony in cross examination.
>
> Since it has been brought up and since the Court has overruled out objection, we would like to go into that area without waiving any of our prior objections made on the direct examination.
>
> The Court: Well, the area to go into is the area of the factual basis that he related to them. Your going into it may take it out of the area that I have instructed the jury on relative to what he did for the purposes of arriving at what the defendant was confronted with, and I think the information he related to this defendant, you can inquire as to its truthfulness or where he got it, but you have to understand that it may be received on a different basis by the jury than that which was related by this officer.
>
> Mr. Levine: It is our objection that it has already been received by the jury for an impermissible purpose. We feel it is impossible for them to do it, although the Court instructed the jury.
>
> We feel we have to address and defend --
>
> The Court: If you go into it with him, what he relates from those witnesses you are going to have to live with.
>
> Mr. Levine: We want to make it a point that we would not go into these areas but for the Court's ruling, and we feel we are compelled to do so. (Tr. 946-47).

During the course of his cross-examination of the police officer, counsel touched upon the manner in which the interrogation had taken place, including the use of the Gibson statements, but made no inquiry into the truth of those statements (Tr. 970-97). Thereafter, during the direct examination of the other interrogating officer, Detective Zatrepalek, the following transpired:

> Q. Did you, in the course of your official duties, receive sworn statements from Elijah Gibson and Mary Gibson?
>
> A. Yes.
>
> Q. Do you have those statements in your possession?
>
> A. Yes.
>
> Q. May I see them, please.
>
> A. Yes. (Tr. 1014).

The prosecutor had the statements marked for identification purposes in the presence of the jury (Tr. 1014-15), after which

the court sustained the objection of counsel to the admission of the statements (Tr. 1015-16).

In his initial closing argument to the jury, counsel for defendant remarked upon the fact that the prosecutor had not produced the Gibsons at trial, in the context of the interrogation of appellant:

> They had to hook up somebody in the house. There are six adults living in that house. You heard the statements about Mary and Elijah Gibson. Where were those people? Did the State bring them in? Of course not, because what they would have had to bring in were two more suspects, and the only people you saw in here were the detectives.
>
> Who would have been better than to bring in Mary and Elijah Gibson and say, "We heard this, we saw that on that night."
>
> Would you not have wanted to see them? Again, a lack of evidence.
>
> Would you not have wanted to hear from them? Would you not have wanted to hear how they supposedly saw McArthur Breedlove with this evidence?
>
> Who would be the best person to tell you that? They were available, but they were not here. Again, you had to get it from the detectives.
>
> * * *
>
> . . . That is the best place to hear it -- from the horse's mouth, and neither of those people came in here.
>
> It is the mother and brother of my client. Why not bring them in here?
>
> They are the State's witnesses, or they are supposed to be. (Tr. 1152-54).

The prosecutor, in his closing argument, remarked as follows:

> There were some questions raised about Mary Gibson and Elijah Gibson. Questions have been raised by Mr. Zenobi about the statements that Mary Gibson made to the police on November the 9th, and that Elijah Gibson made to the police on November the 9th.
>
> He asked questions about those statements, and that is proper. That is a fair issue for him to raise, and then he said, "Why didn't the State produce them as witnesses?"
>
> I am going to answer both of those quesions for you right now. The State Attorney's office is not in the business, ladies and gentlemen, of compelling a mother to come in and testify against her son, and in a first degree murder case, when we are seeking the electric chair. We are not in the business of doing that,

if we can avoid it. We are not in the business of compelling a brother to testify against his own brother in a first degree murder case, where we are seeking the death penalty.

What would you expect those people to say if they came in here: "I don't know. I forgot. It's been a long time."

* * *

I will tell you this, and you heard the testimony, both the mother and the brother gave sworn statements to the police on November the 9th, 1978. Detective Ojeda had the sworn statements in his report. We took them out, and they are marked as evidence.

They gave their statements back on November the 9th. At that time, Mr. Breedlove was being interviewed by Ojeda and Zatrepalek. They gave their statements to another detective.

They did not know he was being charged at that point with first degree murder. They told the truth at that point.

You can rest assured of one thing; you can be as certain of this as you can that you are sitting in those seats right now: If the statements of Mary Gibson and if the statements of Elijah Gibson did not say exactly what Detective Ojeda and Detective Zatrepalek told you they said, Mr. Zenobi would have brought it out to you. He would have brought Mary Gibson in here and Elijah Gibson in here, and they would have told you, "We did not say those things."

* * *

Now, with respect to Mary Gibson and Elijah Gibson, who would be in a better position to testify for the defendant than his own mother and his own brother, if they had anything helpful to say, and that is why I would ask you to use common sense and your ordinarily good judgment. Do not --

* * *

. . . Do not have any doubt whatsoever about what Mary Gibson and what Elijah Gibson told the police, because if there was a conflict, they would be in here telling you about it. (Tr. 1185-88).

Motions for mistrial based upon these comments were denied after the argument of the prosecutor, at which point the trial court made its finding that "the context in which the argument was made was not prejudicial in nature" (Tr. 1206), not,

as indicated in the opinion of this case, in denying a post-trial motion. Slip opinion at 10, n.8. Thereafter, counsel for appellant presented his final argument, a portion of which is quoted in the decision of this Court for the proposition that "defense counsel admitted that those statements were true." Slip opinion at 10. A reading of the entirety of that portion of that argument reveals that counsel made no such admission; rather, his argument was in rebuttal of that of the prosecutor to the effect that appellant should have called the Gibsons as witnesses:

> Were these things suggested to him through prior interrogations, and you could bet your boots these detectives kept working on him, because I go back to what I asked you before, "On Wednesday morning, could you have convicted my client before you heard from Ojeda and Zatrepalek," and every one of you know the answer, not could have been, but was "no way". No way There was nothing but a bicycle to tie my client to this case, and a bicycle that could have been ridden by Mary Gibson, Elijah Gibson, or a bicycle that could have been ridden by the other four adults in that house, and what about those people? What did they do? They pointed the finger at my client.
>
> Sure it is his mother and brother. I do not like mothers and brothers testifying like that against my client. They said, "He did it. He is the one."
>
> Mr. Godwin would have you believe we can call people like that.
>
> The State has the largess not to call people like that. They are kind. They do not call people like that.
>
> They did not have any compunctions about asking the detectives what they said, did they? They did not have one problem asking them.
>
> * * *
>
> If you could do that, why not call the person who said it into Court, and would you have liked to have seen Elijah Gibson? Wouldn't you have liked to have seen Mary Gibson? . . . (Tr. 1218-19).

Appellant submits that this Court overlooked or failed to consider the tenor and affect of this argument by counsel, as well as the context of this trial. At the time that counsel made these comments, the prosecutor had put the truth of the Gibson statements into issue, and the trial court had overruled

objections to those comments in the presence of the jury. This Court did not hold that the cross-examination of the police officer regarding the Gibson statements in any manner barred appellate review of this issue, and no such holding would be possible. Counsel for appellant were duty-bound to represent him zealously at trial, and any suggestion that their conduct waived review of this issue would impose a requirement that counsel for an accused remain silent with regard to any illegally-obtained or improperly-introduced evidence at the risk of barring review of otherwise-preserved issues. The law does not impose such impossible burdens. Louette v. State, 152 Fla. 495, 12 So.2d 168, 174 (1943).

The same analysis applies to the final closing argument of counsel, upon which this Court relied to find the comments of the prosecutor not prejudicial. Had counsel not touched upon the Gibsons, the jury would have been left with the closing argument of the prosecutor and his assertion that the statements were true. The issue having been properly preserved for appellate review, counsel for appellant was entitled -- if not absolutely required -- to attempt to mitigate the highly prejudicial effect of what this Court has determined were improper prosecutorial remarks.

Moreover, this Court also failed to consider its prior decision in McCall v. State, 120 Fla. 707, 163 So. 38 (1935), upon which appellant has relied. In that case, a first-degree murder prosecution in which the basis of the charge was that the defendant had hired another individual, Coy Strickland, to commit the homicide, a post-arrest statement given by Strickland was admitted into evidence, and the jury was instructed that it was not to be considered for its truth in evaluating the guilt or innocence of defendant, but only for determining whether or not Strickland was the principal in the homicide. 163 So. at 40-42. Strickland also testified at trial, and the decision notes that counsel therefore "had the opportunity of cross-examining him about those statements in the presence of the jury." Id. at 42.

In his closing argument, however, the prosecutor argued that Strickland had told the truth in his statements. 163 So. at 44-45. Counsel for the defendant objected to this argument, and the trial court emphatically instructed the jury to disregard it. Id. at 45. Nonetheless, this Court found reversible error:

> Now, it is true that the trial judge did what he could to correct the improper arguments presented, but it occurs to us that he "locked the stable after the horse was gone." The harm had been done. This testimony that was only admissible for the purpose of tending to prove that Coy Strickland had fired the fatal shot had been used by the state, not only for the purpose of going to show that Coy Strickland fired the fatal shot, but also to show that the accused McCall procured and hired Coy Strickland to fire the fatal shot, and it was necessarily impressed upon the jury, the judge's instruction and charge notwithstanding, that here was concrete evidence of the participation of McCall in the murder of the deceased Spear.
>
> * * *
>
> The rule appears to be that when a prosecuting attorney has indulged in improper argument, the question is whether or not the court can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion can be reached the judgment must be reversed.
>
> It appears to us that the argument of the prosecuting attorney in this case was necessarily prejudicial to the accused. It assumed the existence of evidence against the accused which did not exist in the record as against him. . . . [T]he state's attorneys were not authorized to argue the extrajudicial statement of Coy Strickland the same as if it had been evidence given at the trial by Coy Strickland.
>
> And so the judgment must be reversed. 163 So. at 45-47 (citations omitted).

Several critical factors regarding the application of McCall to this case are readily apparent. First, as in this case, evidence was introduced as ostensible non-hearsay (and held properly so by the Court in McCall), and the jury was instructed to so consider it. In both cases, the prosecutor argued that the extrajudicial statements were true; in McCall, unlike this case, objections were sustained and the jury instructed to dis-

regard the comments, in very forceful language. Nonetheless, the McCall decision found the remarks not subject to being cured by instruction, and reversed. In this case, where the court overruled objections to the comments in the presence of the jury, the same result should obtain; and this is particularly so since in this case, unlike McCall, the out-of-court declarants did not testify at trial. Appellant accordingly submits that this Court overlooked or failed to consider critical aspects of the record and the controlling effect of its McCall decision in resolving this issue, and that rehearing is therefore mandated.

IV

The fourth issue raised on appeal involves additional prejudicial remarks by the prosecutor in his closing argument. This Court concluded that "[s]ome of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required." Slip opinion at 11. Appellant submits that this Court overlooked or failed to consider several important factors in reaching this conclusion.

The first argument raised by appellant was the reference by the prosecutor to an alleged intent on the part of appellant to commit a sexual assault during the course of the charged burglary (Tr. 1197-98). The decision recognized the impropriety of this comment:

> Breedlove charges that the state implied that Breedlove wanted to rape the woman in the house he was burglarizing. In going through what happened, the prosecutor said that because of the purse Breedlove knew that a woman lived there. This is a permissible inference. His next comment, however, is not supported by the evidence: "He went prowling through the house to find that woman." . . . Slip opinion at 10 n.9.

However, the opinion is silent as to the basis for the ultimate conclusion by this Court that these remarks were not prejudicial error. This Court long ago recognized the total

impropriety of such remarks, in language strikingly apposite to this case:

> There was no evidence in the record from which the jury could infer the commission of any other crime by defendant. It is well settled that statements or intimations by the prosecuting attorney that accused has committed other crimes besides that for which he is now on trial constitutes error.
>
> It is fair to say that the average juror will regard the crime of rape as no less heinous than the most cold-blooded murder, and, beings so, it is doubtful if the sinister influence of the remarks complained of, and other remarks made to the jury in this case, which we do not take the time and space to relate, could be erased by withdrawal or any admonition the court could give. In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. Simmons v. State, 139 Fla. 645, 190 So. 756, 758 (1939)(citations omitted).

Accord Ruiz v. State, 395 So.2d 566, 567 (Fla. 3d DCA 1981); Glassman v. State, 377 So.2d 208, 211 (Fla. 3d DCA 1979); Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959); Gonzalez v. State, 97 So.2d 127 (Fla. 2d DCA 1957).

In a situation remarkably similar to that presented in this case, the First District held that intimations by the prosecutor that an accused charged with murder had raped the victim prior to her death, which were not supported by the evidence, were improper and prejudicial in that a defendant, in such a situation is "in effect being charged with a crime without notice and opportunity to prepare his defense prior to trial." Beagles v. State, 273 So.2d 796, 799 (Fla. 1st DCA 1973). The decision of this Court in this case is bereft of any rationale for departing from this principle.

The second aspect of the closing argument challenged in this issue was the vituperative characterization of appellant by the prosecutor (Tr. 1198). The sole holding of the Court on this claim was that "[t]he prosecutor characterized the killing

as a "'savage and brutal and vicious and animalistic attack;' he did not refer to Breedlove as an 'animal.'" Slip opinion at 10 n.10. This holding takes the remarks of the prosecutor out of their proper context:

> The exact physical acts performed by Frank Budnick we will not know. We do not know whether he died a hero or not. We will not know, but something happened which caused him to wake up, and McArthur Breedlove now knows that there is someone in this house who can identify him, have him convicted of a crime, and he took that knife, ladies and gentlemen, and he engaged in a savage and brutal and vicious and animalistic attack upon the two people in that bed. (Tr. 1198).

It is beyond question that the prosecutor was referring specifically to appellant in this regard, and that his remarks were not mere characterizations of the offense but of the person -- appellant -- alleged to have perpetrated it.

The third aspect of this issue is the appeal by the prosecutor to the jury to convict appellant for the sake of the community. The holding of this Court on this contention is as follows:

> The prosecutor said: "When we walk the streets we take our chances." In response to an objection the court said: "One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home." The court overruled an objection to this remark. These comments appear to reflect common knowledge and they are probably the sentiments of a large number of people. They do not appear to be out of place. Slip opinion at 10 n.11.

This holding ignores the context of the remarks, which were preceded by the urging of the prosecutor that a first-degree murder verdict was necessary because "nothing else will satisfy the conscience of this community." (Tr. 1199). The prosecutor was obviously seeking a guilty verdict on the basis of the fears of the community, rather than on the evidence in the case. Florida law has always condemned such remarks. See, e.g. Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979); Reed v. State, 333 So.2d 524, 525 (Fla. 1st DCA 1976); Russell

v. State, 233 So.2d 154 (Fla. 4th DCA 1970); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). And the obvious rationale for this rule of law is that such fears do in fact exist among the citizenry, but have no place in a criminal trial.

Yet this is precisely the rationale upon which this Court has relied to find the remarks in this case not "out of place" in this trial. While lay persons might well believe that such considerations are important in determining the fate of an individual accused, "the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime", Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied 348 So.2d 953 (Fla. 1977), and this Court has always held that "[t]he trial of one charged with crime is the last place to parade prejudicial emotions. . . ." Stewart v. State, 51 So.2d 594, 595 (Fla. 1951). In short, the very fact that the comments of the prosecutor in this case "appear to reflect common knowledge and are probably the sentiments of a large number of people" establishes, under unbroken Florida precedent, that they were "out of place" and prejudicial in a criminal trial.

V

In the fifth issue raised on appeal, appellant sought reversal of the judgment and sentence entered for the offense of burglary in this case, relying upon State v. Pinder, 375 So.2d 836 (Fla. 1979). As the decision of the Court notes, the recent decision of State v. Hegstrom, 401 So.2d 1343 (Fla. 1981) establishes that the only relief to which he could be entitled is vacature of the sentence. However, this Court found that "the state introduced sufficient evidence of premeditation", and accordingly upheld the sentence. Slip opinion at 11-12. Appellant submits that this Court overlooked certain important aspects of the record in reaching this conclusion.

First, the only evidence introduced at trial which established the manner in which the homicide had occurred was the post-arrest statement of appellant, in which he stated that

he had entered the bedroom of the residence with a knife, which he had intended to use to open a jewelry box, and that the following then occurred:

> A. Well, I started going through a box -- a jewelry box, the dresser drawers, and I made some noise, and the guy woke up and grabbed me by the shirt, and I swung back with the knife, and I ran. (R. 133).
>
> * * *
>
> A. I jumped, panicked. He just grabbed my shirt. I swung back with the knife, like that, and then he turned loose of my shirt and I ran. (R. 134).

This evidence clearly does not establish the element of premeditation. See Sireci v. State, 399 So.2d 963, 967 (Fla. 1981); Davis v. State, 138 Fla. 798, 190 So. 259, 260-61 (1939); Forehand v. State, 126 Fla. 464, 171 So. 241, 242-43 (1936); Miller v. State, 75 Fla. 136, 77 So. 669, 671 (1918); Thompson v. State, 397 So.2d 354, 356 (Fla. 3d DCA 1981); Hines v. State, 227 So.2d 334, 335 (Fla. 1st DCA 1969); Weaver v. State, 220 So.2d 53, 59 (Fla. 2d DCA 1969), cert. denied 225 So.2d 913 (1969). Perhaps the best proof of this lack of evidence is the fact that the prosecution proceeded solely on a felony-murder theory at trial (Tr. 466, 1158-59, 1199), which is totally overlooked in the decision in this case.

Indeed the reliance by this Court upon a different theory to uphold the burglary sentence is in and of itself a due process violation; appellant was entitled to have the validity of the sentence determined upon the same basis as which he was tried. Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord Presnell v. Georgia, 439 U.S. 14 (1978); Eaton v. City of Tulsa, 415 U.S. 697 (1974). The absence of any legal basis for upholding the burglary sentence under State v. Hegstrom, supra, requires a grant of rehearing on this claim.

VI

In his sixth point on appeal, appellant asserted several claims regarding the imposition of a death sentence in this case. These claims and the grounds for rehearing on each will be addressed sequentially for the sake of clarity.

A.

The first issue raised regarding the death sentence was that the Eighth and Fourteenth Amendments forbid the imposition of death as punishment for a pure felony-murder absent a finding of a premeditated intent to kill. This Court rejected this claim for two reasons: 1) that this Court and the Supreme Court of the United States "have found that the death penalty is not per se violative of either the federal or state constitution"; and 2) the fact that this Court has uniformly reversed death sentences in pure felony-murder cases is irrelevant because "all but one concern jury overrides." Slip opinion at 12 (footnotes omitted).

The decision cites to Gregg v. Georgia, 428 U.S. 153 (1976) for the proposition that the death penalty does not violate the Eighth Amendment; however, the Supreme Court in Gregg was careful to note that it was addressing only "the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender". 428 U.S. at 153; see also Jurek v. Texas, 428 U.S. 262, 268 (1976). Neither the Supreme Court nor this Court have expressly passed upon the validity of the death penalty in a pure felony-murder situation. Moreover, the rejection by this Court of the applicability of its prior precedent in felony-murder cases involving death sentences on the sole ground that those cases involved "jury overrides" is totally inappropriate in light of the declared responsibility of this Court to ensure fair and equal imposition of death:

> . . . Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man

> die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. . . . State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Dixon does not hold that differing jury recommendations can justify unequal application of capital punishment. And the most recent explanation by this Court of its review function dictates to the contrary:

> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review will all past capital cases to determine whether or not the punishment is too great. In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981) (citations omitted).

Thus, neither of the bases for rejection of the claim asserted by appellant justify the refusal of this Court to consider the constitutionality of the death penalty in a felony-murder situation. Further, to the extent that the holding of this Court on this issue is based upon its finding that there was sufficient evidence of premediations, see Point IV, the same due process violation is involved.

B.

The second issue raised under Point VI concerns the application of aggravating and mitigating circumstances by the trial court. Appellant first challenged the application of two aggravating circumstances found by the trial court, felony-murder and especially heinous, atrocious and cruel. See §§921.141(5)(d), (h), Fla.Stat.(1979). The basis for the challenge to the application of subsection (5)(d) was that it creates a mandatory presumption that the infliction of death

is warranted in every felony-murder case, and that this presumption fails to satisfy the constitutionally-mandated test for the validity of evidentiary presumptions in criminal cases. This Court summarily rejected this assertion, holding only that appellant presented "nothing which compels declaring the felony-murder aggravating circumstance unconstitutional." Slip opinion at 12. Again, to the extent that this holding was influenced by the finding of sufficient proof of premeditation, the same arguments raised in Point IV of this motion apply.

Further, this Court apparently misconstrued the claim of appellant. Appellant did not seek to have this Court declare "the felony-murder aggravating circumstance unconstitutional", but rather to limit its application by holding it improper in a pure felony-murder case, as the Supreme Court of North Carolina did in State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). The constitutional basis for this claim was two-fold. First, well-established Supreme Court precedent provides that mandatory presumptions are unconstitutional unless the evidentiary fact, in this case felony-murder, supports the ultimate fact, in this case the propriety of a death sentence, beyond a reasonable doubt. See, e.g. County Court of Ulster County v. Allen, 442 U.S. 140 (1979). Second, the Eighth Amendment forbids presumptions that death is appropriate, based solely upon conviction for a "capital" crime. See Woodson v. North Carolina, 428 U.S. 280 (1976); Shue v. State, 366 So.2d 387 (Fla. 1978); Purdy v. State, 343 So.2d 4 (Fla. 1977). This Court overlooked or failed to consider these issues in passing upon the claim of appellant in this case.

Appellant challenged the application of subsection (5)(h) in the trial court on several grounds: the introduction of irrelevant and prejudicial testimony regarding the pain suffered by the victim prior to his death, the insufficient instructions on this factor which failed to properly define it for the jury, and the findings of the trial court in support of its determination that subsection (5)(h) applied in this case. This Court found only that the trial court had properly applied

applied the circumstance:,

> . . . The trial court properly found the murder to be heinous, atrocious, and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in this bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place. Slip opinion at 12-13.

This holding overlooks or fails to consider the admission by the trial court of extensive testimony by a medical examiner -- who did not perform the autopsy in this case and whose testimony was based solely upon his review of the file -- regarding the "considerable" pain suffered by the victim (Tr. 1219-22), the obvious impact of this testimony upon the jury, and its documented effect upon the trial court in its finding of this aggravating circumstance (R. 186). Despite acknowledging that "pain and suffering alone might not make this murder heinous, atrocious, and cruel", the decision in this case overlooks the patently prejudicial impact of the testimony introduced in this regard. Furthermore, this Court overlooked or failed to consider the inadequate instructions of the Court, which refused to instruct the jury in accordance with State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and the consequent unconstitutional application of subsection (5)(h) in the trial court. See Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980).

Additionally, the only basis upon which this Court approved the application of subsection (5)(h) in this case, that "the attack occurred while the victim lay asleep in his bed" as opposed to in a "public place", is neither constitutionally sound nor factually supportable. This Court has never before relied upon the fact that a homicide occurred in the home of a

victim as establishing this aggravating circumstance; indeed it has specifically found to the contrary. For example, in Tedder v. State, 322 So.2d 908, 909 (Fla. 1975), in which the defendant fired at his wife and mother-in-law, pursued them into their home, shot his mother-in-law and forced his wife to leave with him, refusing to allow her to attend to her mother, this Court held that the homicide was not within subsection (5)(h):

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder. Id. at 910 (footnote omitted).

In Lewis v. State, 398 So.2d 432, 434 (Fla. 1981), the victim was seated in his bedroom, watching television, when the defendant and an accomplice "simultaneously fired upon him from outside the bedroom window, using a .30-.30 rifle, and a 12-gauge shotgun", inflicting multiple gunshot wounds which killed the victim. This Court held that subsection (5)(h) did not apply. Id. at 438. Indeed, Godfrey v. Georgia, supra, also involved a homicide committed in the home of the victim, and the Supreme Court held that, as a matter of Eighth Amendment law, the virtually-identical aggravating factor found by the Georgia courts in that case could not be applied. 100 S.Ct. at 1763, 1767.

Furthermore, to the extent that the holding of this Court is based upon the fact that the homicide in this case occurred in a residence, it is but another characterization of the fact that it occurred during a burglary. Of course, the trial court found that this fact gave rise to the application of subsection (5)(d), and this Court approved that finding. To hold that this "same aspect" of the offense gives rise to another aggravating circumstance is directly in violation of the rule against such "doubling up" of aggravating factors established

by this Court in Provence v. State, 337 So.2d 783, 786 (Fla. 1976).

Finally, the factual basis upon which this Court rested its finding is nonexistent. The medical examiner who performed the autopsy testified that his internal examination of the body of the victim provided no basis upon which to determine whether the victim had been moving at the time of the homicide (Tr. 770). He further testified that the pattern of bloodstains indicated the victim had been standing erect when injured (Tr. 767), and that the "defense wounds" on the hands of the victim were consistent with the victim having reached for the knife (Tr. 773), as defendant stated that he had (R. 133-34).

The medical examiner did testify, on direct examination, that his findings were consistent "with the knife coming from above and striking from above, a person laying down. . . ." (Tr. 771). However, he subsequently clarified this statement as follows:

> Q. I presume you also assumed in your answer to Mr. Stelzer's question that the victim was staying still or was somewhat relatively still when this knife was brought towards him. Is that correct?
> A. I can't state that for sure, sir.
> Q. So you do not know whether the victim was in fact moving towards his assailant at that time.
> A. No. I don't know if he was moving at the time. (Tr. 780).

And the prosecutor conceded in his closing argument that the State could not establish by independent evidence the location of the victim at the time of the stabbing, and further conceded that he had not been asleep at that time:

> The exact physical acts performed by Frank Budnick we will not know. We do not know whether he died a hero or not. We will not know, but something happened which caused him to wake up. . . . (Tr. 1198).

Accordingly, appellant submits that the factual basis upon which this Court rested its conclusion that subsection (5)(h) was properly found by the trial court is refuted by the record.

The second aspect of this issue is the urging by the prosecutor of non-statutory aggravating circumstances in his argument to the jury to recommend a death sentence. The decision of this Court recognizes the impropriety of this argument, noting that they "may have stretched the bounds of proper argument", but held that appellant "does not appear to have been prejudiced because the court did not find them in aggravation." Slip opinion at 13 (citations omitted). This holding fails to consider the great importance placed upon the jury recommendation under Section 921.141; this Court has repeatedly emphasized that the advisory verdict of the jury is a key component of the death-sentencing process. See, e.g. Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980). LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974).

Thus, in Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977), where non-statutory aggravating factors were presented to the jury and found by the court, this Court reversed the sentence and remanded for a new sentencing hearing. For the Court to hold, as it does in this case, that a prosecutor may violate one of the most basic principles governing the application of Section 921.141 and that a defendant has no valid complaint if the non-statutory aggravating circumstances argued by the prosecutor are not expressly found by the trial court, is logically inexplicable in light of Elledge. Indeed, in that case, the testimony and argument regarding the nonstatutory aggravating evidence has received without objection by counsel for the defendant, yet this Court nonetheless held that a new jury sentencing hearing was required, stressing that the weighing process by both judge and jury must be constitutionally sound:

> . . . But was the error harmless because of the lack of objection and the existence of substantial additional aggravating circumstances? We believe not.

* * *

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial. . . . 346 So.2d at 1003.

In this case, it cannot be concluded -- as it could not in Elledge -- that the weighing process of the jury was not infected by the repeated and prejudicial remarks of the prosecutor regarding non-statutory aggravating circumstances. It is thus fundamentally wrong for this Court to find no error on this point simply because the court did not mention the non-statutory factors in its order, ignoring the impact of these factors on the jury. And this holding is particularly ironic in this case. This Court rejected the claim of appellant that the death penalty is unconstitutional as applied in a pure felony-murder case, in part because the other felony-murder cases cited by appellant involved "jury overrides" and this case a jury recommendation of death. Yet, appellant has established a valid reason to believe that recommendation is tainted, and this Court, ignoring the importance of the jury recommendation, has rejected the claim on the basis that the court was apparently not affected by that taint.

The final aspect of this issue addresses the burden-of-proof instructions given by the trial court and its instructions and findings on mitigating circumstances. In finding the instructions "proper and adequate", this Court overlooked or failed to consider the repeated instructions of the trial court to the jury that, if it found an aggravating circumstance to exist, it would then be required to determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances (Tr. 1290, 1459, 1461, 1464), and its decision in Alvord v. State, 322 So.2d 533, 540 (Fla. 1975), holding that the prosecution must establish that aggravating circumstances outweigh mitigating circumstances to justify a death sentence. This Court also overlooked or failed to consider the constitutional

authority requiring that the burden of proof be allocated as in Alvord. See Mullaney v. Wilbur, 421 U.S. 684 (1975).

With regard to mitigating evidence, the decision states that "the court did not limit presentation of mitigating evidence." Slip opinion at 13 (footnote omitted). Appellant did not assert that it did, but rather that the instructions, combined with the allowance by the court of improper prosecutorial argument to the effect that mitigating circumstances were limited to those in the statute, unconstitutionally limited consideration by the jury of the mitigating evidence that was presented. The Supreme Court of the United States, in both Lockett v. Ohio, 438 U.S. 586 (1978) and Gregg v. Georgia, 428 U.S. 153 (1976), declared that merely providing a jury with information in a capital sentencing hearing is insufficient; the jury must be given explicit and complete instructions for using that information. It has recently re-emphasized that requirement, and the constitutional command that all relevant mitigating evidence be considered by the sentencing authority, in Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982).

In this regard, the decision of the Court states that the trial court "after acknowledging the conflicting testimony regarding Breedlove's mental capacity, chose to find his capacity not impaired or diminished." Slip opinion at 13. The decision cites a fragment of the sentencing order, but omits that portion in which the trial court stated its reasons for rejecting that testimony; examination of that portion of the order reflects that the trial court did so based upon its belief that appellant was sane and competent (R. 187-88).

Florida law establishes that the trial court erred in applying the standards of competency and sanity to evidence presented under Sections 921.141(6)(b) and (f), Florida Statutes (1979). See Mines v. State, 390 So.2d 332, 337 (Fla. 1980); State v. Dixon, supra at 10. Appellant accordingly submits that this Court failed to consider the critical aspect of this claim, that the refusal of the court below to consider the mitigating

evidence based upon an inappropriate standard and was therefore constitutionally infirm.

CONCLUSION

Based upon the foregoing, appellant requests this Court to grant rehearing in the above-styled cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion for rehearing was mailed to Alan T. Lipson, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128 this 17th day of March, 1982.

Elliot H. Scherker
ELLIOT H. SCHERKER

Avenue. That would be almost north of the scene, that particular U Tote'm, yes.

Q But insofar as the U Tote'ms on West Dixie Highway are concerned.

MR. ZENOBI: Objection.

THE COURT: Overruled.

A No.

Q [By Mr. Stelzer] What was next?

A We asked him what he had been wearing that night.

He stated that he didn't remember what he had been wearing and he didn't know.

At that point, I, myself, confronted him with the fact that Elijah had told us--

Q Not the fact.

A --that Elijah had told us--

MR. ZENOBI: Objection.

These witnesses are available.

THE COURT: Overruled, counsel.

It is not a question of their availability at all.

Q [By Mr. Stelzer] Go ahead.

A --that he had been wearing long pants and a T-shirt when he left, and that when he returned in the early morning hours, these pants had been cut off.

At that time, Mr. Breedlove, stated that that was not true; that his pants were not cut off.

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I further advised him that I had information that he had arrived at his residence with some type of stain on his pants---

MR. ZENOBI: Objection; hearsay by implication.

THE COURT: Overruled.

The jury has a right to know, counsel, in evaluating the statement made by this defendant, as to what he was confronted with at the time he made the statement.

The objection is overruled.

Q [By Mr. Stelzer] Prior to that, was the defendant ever asked what if anything of an unusual nature had happened?

A Yes, sir.

Q Tell us about that.

A At that particular point, he stated that no, that is not true; that his brother was not telling us the truth.

Then he was asked, "Had anything unusual happened to you on that particular night prior to you arriving at your residence?"

He stated, "No."

I then confronted him with the information that we had received from his brother that he had a red substance--

MR. ZENOBI: Objection as to information from his brother.

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THE COURT: Overruled.

A --on his pants, at which time he stated to u s that he had gotten into a fight at the U Tote'm store with another male who he did not know.

I then confronted him---

THE COURT: I can hear you up here, counsel, so if I can, the jury can also.

Q [By Mr. Stelzer] Did the defendant say that is how the blood got on his clothes?

A Yes, sir.

Q All right.

A He was then confronted about his pants being cut off

He stated that the reason that he did cut his pants was because he did have blood on his pants, and I asked him, "What did you do with your pants," and he stated that he took them off, rolled them up, and placed them in a Dempsey dumpster that was directly behind his residence.

We then asked him again with regards to the bicycle as to where the bicycle had come from.

Again he told us that he had stolen it from 146th Street.

Q Let me stop you for one minute.

Now, how many people are in this room?

A Myself, Mr. Breedlove, and Detective Zatrepalek.

Q Were all three of you in the room at all times?

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A No, sir.

Q If there was a time when all three of you were not in the room, let us know.

A Yes, sir.

He was then confronted again about the bicycle and asked where he had gotten the bicycle.

He reiterated that the bicycle had come from 146th Street, and the reason he had taken the bicycle was because he was tired and needed a ride home.

Then he was confronted again with Elijah's statement about the blood on his pants--

MR. ZENOBI: Objection.

THE COURT: Overruled.

A --and the fact that his pants had been cut off.

At this particular point, I told the defendant that I did not believe his story that he took the bicycle because he was tired.

I told him that I felt that he had gone into a house on 146th Street, and while he was in this house, an altercation occurred and that something happened in that house--that he had stabbed someone and that is how the blood had gotten on his pants.

At this particular point, he stated, "No, that is not true," but just about this time, someone knocked at the door of the office and asked for Detective Zatrepalek to

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walk out, at which time Detective Zatrepalek walked out of the room.

I then continued the interview with Mr. Breedlove.

Q Let me stop you for a moment. At any time, was any mention made of a watch either before or after Detective Zatrepalek walked out of the room?

MR. ZENOBI: Objection to the leading nature of that question and the suggestiveness of that question.

THE COURT: Overruled.

Try not to lead.

A Yes, sir.

During the conversation we had just prior to the area about the blood on the defendant's pants, it was also brought out that we had received information that he had brought a---

MR. ZENOBI: Objection.

Again, it is hearsay, it is prejudicial, and inflammatory.

THE COURT: Overruled, counsel.

The jury is entitled to hear what this man was told by these officers at that time.

Overruled.

It is not being offered to prove what was told as being true, but simply what was said to him.

On that basis, I will overrule your objection.

Go ahead.

A That he showed a watch---

Q [By Mr. Stelzer] Back up a little bit.

A Yes, sir.

He showed--meaning Mr. Breedlove showed--Elijah a watch with rhinestones around the face.

MR. ZENOBI: Objection.

THE COURT: Same grounds, counsel.

MR. ZENOBI: May we have a side bar?

THE COURT: Sure.

[Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the Court outside the presence of the jury and the following proceedings were had:]

THE COURT: What was the basis of your side bar, please, Mr. Zenobi?

MR. ZENOBI: First of all, the basis is that not only is everything that he has been testifying to hearsay, but also, all of these witnesses are available. They are on the State's witness list.

Secondly, the fact that even if the Court considers them not to be hearsay, when he was confronted with these statements, he denied them and nothing further was done with some of them.

THE COURT: I know.

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That is something that can be covered on cross.

The point is, as relates to your continued objection as to hearsay, which I have continued to rule on, the matter does not go to the truth of the matter to be asserted. It is not hearsay, and it is admissible even though said by someone else at some other time.

The jury has a right, in evaluating the defendant's confession, to hear what was told to him by these officers, and they are not to take--and I will instruct them on that--what he said to the defendant as being truthful or not, but the jury is entitled to know what the defendant heard during the course of these conversations, and my rulings will continue to be the same.

MR. LEVINE: May I make a brief response?

THE COURT: If you feel it is necessary.

MR. LEVINE: In brief response, what the detective is saying is that Elijah told the detectives that the defendant had a watch, a gold watch with rhinestones on it.

So far there has been absolutely no physical evidence to link the defendant with the scene.

No property was ever recovered. This provides a direct link to the scene.

Now, for the Court to go ahead and instruct them that it is only to be considered in relation to the

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defendant's response and not for the truth, I do not think it is possible for them to disregard the probative value. It is analogous to him saying, "Well, The Pope told us he witnessed you killing Mr. Budnick," and the defendant says, "That is a lie."

Can the jury disregard the fact that The Pope told the officers that he witnessed a murder? Can they disregard that?

I think it is exactly analogous, and we move for a mistrial at this time.

THE COURT: Denied at this time.

MR. LEVINE: We ask the Court to give a cautionary instruction then that they should disregard any statements that relates to the watch, for any purpose.

THE COURT: That motion is also denied.

MR. LEVINE: Then we will ask that they disregard the statement as relates to the truth.

THE COURT: I will instruct the jury that the statements made by the officer are not made by the officer for the purpose of proving the truth of the matter, but only to know what the defendant was confronted with by these officers, which is exactly the basis on which it is admitted.

MR. LEVINE: We reiterate that it is impossible for them not to consider it that way.

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MR. ZENOBI: We ask that the prosecutor do it the correct way, which is to bring in the witnesses.

THE COURT: You keep saying that.

I feel quite confident, Mr. Zenobi, my rulings are correct, and the only thing I can do is be patient, you can state your objections, and I will rule on them.

If I am in error, then the appellate courts will review it.

I am satisfied I am handling it in the proper fashion, and I trust you are making an objection at side bar rather than in front of the jury---

MR. ZENOBI: I am not doing it as a dilatory tactic.

THE COURT: I do not think you did.

If you are not satisfied with my rulings and think I should be further educated, the best way to do it is to try to further educate me.

MR. LEVINE: The record is bare of any evidence linking the defendant to the crime absent any hearsay statements by the defendant's brother that he was in possession of the property that was described as being taken from the scene of the crime.

THE COURT: Your summary, whether it is accurate or not, is in the record.

[Thereupon, the following proceedings were had

within the hearing of the jury:]

THE COURT: Members of the jury, counsel sometimes have a difference of opinion as to matters of evidence, and that, of course, is my responsibility to resolve.

I have admitted that evidence in this case, and you should understand that as to the officers' testimony about statements made to him by someone else, you are not to accept the statements that somebody else told the officer as the truth of that issue at all.

It is simply to give you the opportunity to evaluate, for the purposes of your decision, what this officer may have told the defendant at the time their conversation took place.

It is not to go to the truth of what he told the defendant, just simply what he said. All right.

MR. STELZER: Just to make that clear, Your Honor is not instructing the jury that they are not to accept the officers' statement.

THE COURT: No, sir.

MR. ZENOBI: Objection.

THE COURT: I am not saying that. I am simply saying that they are not to take those statements that he alludes to from somebody else as being the truth.

They are simply statements made by the officer which may or may not have been brought to his attention

by somebody else.

Go ahead.

Q [By Mr. Stelzer] Back up half a step. My question was, was anything mentioned by either you or Detective Zatrepalek to the defendant about a watch, and if so, what did you say and what did the defendant say back to you?

A Yes, sir. I mentioned that we had received information from Elijah--

MR. ZENOBI: Objection, same grounds.

THE COURT: All right, counsel. Same ruling.

A --that the defendant had shown him a watch on the early morning hours of Monday, and that this watch was described as having rhinestones around the face of the watch, at which time Mr. Breedlove said to us, "I did not have that watch. My brother is lying."

Q [By Mr. Stelzer] What was the next thing that happened?

A At that particular time, a knock came to the door, and Detective Zatrepalek was summoned out of the room. For what reason, I believe it was a phone call.

I continued conversing with the defendant.

Q All right.

A I asked him, at that particular point, the whereabouts of where he took the bicycle from. He again told me that he had taken it from 146th Street.

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Q This, I take it, you were able to observe from your internal examination as well as your external examination.

A Yes, sir.

Q While we are on the internal examination, could you tell, from your internal examination, whether or not the body of Frank Budnick was moving at all at the time the knife wound was inflicted?

A Not really.

Q Could you tell the direction that the knife wound went in?

A Yes, sir.

Q Would you go ahead and tell us the direction, please.

A Okay. The wound went from left to right [indicating]. It went from---

Q Let me just make sure.

A Okay.

Q Your left is different from my left. From your left to your right?

A Yes, sir.

Q So it was this way [indicating]?

A Yes. From up to down.

Q This way [indicating]?

A Yes.

Q And from front to back. That is from your front to your back.

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A Yes.

Q So it would be in somewhat of a direction like this [indicating]?

A That is the direction that the knife penetrated the skin.

Q All right, sir. Is that information which you have just given us consistent with the knife coming from above and striking from above, a person laying down in something such as a bed?

A Yes, sir, it would be.

Q Were you able to see how deep that knife penetrated into the chest cavity of Frank Budnick?

A Yes, sir.

Q How deep did it go in?

A Five and a half inches.

Q Would that be consistent with a great deal of force applied to the knife?

A Going through the clavicle would make it consistent with a great deal of force. The other structures are not things that require force to go through.

Q Did you do any examination to determine whether there were any drugs in the body of Frank Budnick?

A Yes, sir, I did.

Q Did you detect the presence of any drugs in the body of Frank Budnick?

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A Yes, sir.

Q What drug did you detect the presence of in the body of Frank Budnick?

A Therapeutic levels of Tylenol.

Q Tylenol is the stuff you take instead of aspirin?

A Yes, sir.

Q Any other drugs?

A We tested for several other drugs.

Q Such as?

A We tested for alcohol. We tested for methyl alcohol, which is sometimes used instead of regular alcohol.

We tested for Acetone. We tested for aspirin. We tested for phenothiazines; tranquilizers such as Thorazine; amphetamines and barbiturates. We tested for Oxazepam and benzoyl Ecgonine, cocaine. We tested for morphinans, heroin and opium derivatives. We tested for Methadone, Darvon, Quaalude, and marijuana, and none of these tests were positive.

Q The only drug you found was Tylenol. Is that correct?

A Yes, sir.

Q Did you observe any of these wounds that you have characterized as defense wounds on the body of Frank Budnick?

A Yes, sir, I did.

Q How many defense wounds did you find on the body of

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Frank Budnick?

A On the palmar aspect of the right hand, he had five wounds over this aspect [indicating]. They were scattered throughout the hand.

Q Would those wounds be consistent with a person grabbing at a knife as it was coming towards him?

A Yes, sir, they would be.

Q Would it also be consistent with an attempt to ward off other knife blows as the knife came at him?

A It would be consistent.

Q Did you take any photographs of those defense wounds on the hands of Frank Budnick?

A Yes, sir, I did.

MR. STELZER: Would you mark this, please.

THE CLERK: 3-X for identification.

[Thereupon, the item referred to was marked for identification as State's Exhibit No. 3-X.]

Q [By Mr. Stelzer] While defense counsel is looking at 3-X, Doctor, I will ask you if you can identify that which is marked in evidence in this case as State's Exhibit No. 40.

A I remember the face, and I matched up the case number with our case number, 78-2718, and from the setting, I can recognize this as an identification photo of Frank Budnick. I do not recognize the gentleman identifyin

him.

Q You do not recognize the living person?

A No, sir.

Q Was the dead body identified on that day as Frank Budnick?

A Yes, sir.

Q That is the one you have been talking about today as having performed an autopsy on?

A Yes, sir.

MR. STELZER: You have no objection, Mr. Zenobi, to 3-X?

MR. ZENOBI: No.

THE COURT: Admit it.

THE CLERK: 3-X becomes State's Exhibit No. 43.

[Thereupon, the item referred to was marked as State's Exhibit No. 43 and received in evidence.]

Q [By Mr. Stelzer] Would you step down one more time for a moment, please. Showing you what has been marked as State's Exhibit No. 43, you can use this pointer for a second, and I ask you, first of all, if you can identify this photograph.

A That has 2718. That is a photograph of the hand of Frank Budnick that I took.

Q Does that reflect the way the hand of Frank Budnick looked on that day when you took that picture?

A Yes, sir.

Q Does this photograph accurately depict the defense wounds you are talking about on his hand?

A Yes.

Q Would you show the members of the jury what you mean by a defense wound.

A One, two, three. There is one here you can barely see the edge of, and one here. That's five.

Q You may have a seat again.

Did everything that you testified to today and from your report take place within the County of Dade and the State of Florida?

A Yes, it did.

Q Thank you, Dr. Kessler.

MR. STELZER: Your witness.

THE COURT: Cross, please.

MR. ZENOBI: Thank you, sir.

CROSS EXAMINATION

BY MR. ZENOBI:

Q Doctor, I heard you talk about your inspection for drugs in the body. Are there certain things that happen in the human body which leave residual effects from the use of prior drugs, that although someone may not be using them at that time, there is something in the body that indicates that they may have been used?

fact Mr. Budnick had been using heroin to a large extent or to a small extent. Is that correct?

A I couldn't tell whether he used it at all, sir, but from my toxicological evaluation at the time I did the autopsy, heroin was not present.

Q Could you have eliminated the fact that he used heroin from those lymph nodes?

A No.

Q You made a statement before about the force of the knife going into the left pleural cavity, I believe you said. Is that correct?

A Yes, sir.

Q Correct me if I get any of the medical phrases wrong, but you stated it went through the clavicle, which is, I believe, this bone right here [indicating].

A The collar bone, sir.

Q It would be the left collar bone. Am I right so far?

A I am just showing it [indicating].

Q Now, you stated that there was great force behind this blow because the collar bone was broken. Is that correct?

A Yes, sir. I compared it to just going into the chest cavity and not hitting the collar bone.

Q That is your only basis of comparison. Is that

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correct?

A Also, in doing work on bones, forensic osteology, I know the collar bone is a tough bone and it is hard to cut.

Q I presume you also assumed in your answer to Mr. Stelzer's question that the victim was staying still or was somewhat relatively still when this knife was brought towards him. Is that correct?

A I can't state that for sure, sir.

Q So you do not know whether the victim was in fact moving towards his assailant at the time.

A No. I don't know if he was moving at the time.

Q If that were so, of course you would have comparatively less force being used by the victim at the time. Is that correct?

MR. STELZER: Being used by the defendant.

THE COURT: Being used by the person using the knife.

A Yes, sir.

Q So you would have to know the relative speeds of the knife and also of the victim moving towards the knife. Is that correct?

A That's correct, sir.

Q So your statement about great force being used--I believe you said something about force being used--since

Q After going through this constitutional rights advisement with the defendant, did there come a time when you and Detective Zatrepalek conversed with the defendant, and if so, will you tell the members of the jury, please, what you said to the defendant and what the defendant said to you.

During the course of your testimony, I may stop and ask you additional questions.

MR. ZENOBI: Renew all pre-trial objections.

THE COURT: Same ruling.

MR. ZENOBI: Does the Court wish us to restate them?

THE COURT: They have been previously stated, Mr. Zenobi, thank you.

I do not think it is necessary.

Go ahead.

A At that time, prior to the constitutional rights, we had identified ourselves as homicide detectives of the Public Safety Department, Dade County.

I said, "My name is Julio Ojeda and my partner's name is Charles Zatrepalek."

I told him that I could probably be referred to as"OJ," because my last name is difficult to pronounce, and Charles Zatrepalek is difficult to pronounce and can be known as Charlie or Zat."

MR. STELZER: May we approach the side bar, please?

THE COURT: Yes.

[Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the Court outside the presence of the jury and the following proceedings were had:]

MR. STELZER: One of the things the detective asked Mr. Breedlove is, "What do they have you in jail for," and he is going to say, "I am under arrest" or "They arrested me for loitering and prowling or me giving false information."

That is part of their conversation. I wanted to bring that fact up now.

If the Court decides that should not be brought up, the jury could be excused and Detective Ojeda should be instructed not to say that, if there is anything improper in that.

MR. ZENOBI: Our position is that it is improper and he should be instructed not to bring that up, as a collateral matter.

THE COURT: I had earlier ruled that the question as related to that could be responded to.

If you are asking for early advice on what position you should take, I would overrule his objection

to that question when he makes it.

[Thereupon, the following proceedings were had within the hearing of the jury:]

Q [By Mr. Stelzer] All right, Detective. At this point, you may proceed and tell us everything that the defendant said to you and what you and Detective Zatrepalek said to the defendant.

A I then instructed him that we would be referred to as "OJ and Charlie or Zat."

He then advised us prior to the constitutional rights, that his name was McArthur Breedlove.

Then we read the constitutional rights waiver form. It was signed to make sure he understood everything, and we started a conversation.

He was asked, you know, what is his name.

Again he stated that his name was McArthur Breedlove, and he also uses the name of Jenkins.

He had been recently arrived from California approximately two months ago, and we asked him what had happened.

He stated that he had been arrested on the previous night---

MR. ZENOBI: Objection.

THE COURT: That is what we noted at side bar.

The objection is noted and overruled.

Go ahead.

A He had been arrested by the North Miami Beach Police Department for loitering and prowling.

He also advised us that during the course of the two months that he had been here from California, he had been continually harassed by either the North Miami Beach Police Department or the North Miami Police Department.

We asked him what was the harassment, and he advised that the reason he thought he was being harassed was that he was constantly being stopped by the North Miami Beach and North Miami Police Departments in the middle of the night as he was walking through residential areas.

He stated that also happened to him here in Miami, and it also happened in California.

We then asked him how he got his money or how he lived, did he work, and he stated that he was---

MR. ZENOBI: Objection, Your Honor.

This was never covered in the pre-trial motions.

THE COURT: I do not know if the area was or was not.

MR. ZENOBI: I think it is objectionable at this point.

THE COURT: Overruled.

Q [By Mr. Stelzer] Go ahead, Detective. You may answer.

BEST IMAGE

A We asked him how he obtained his money, and he stated that he was unemployed.

I asked him where he obtained his money.

He said he did odd jobs.

We asked him what kind of odd jobs they were, and he said "just odd jobs."

We then asked Mr. Breedlove if he owned a ten-speed blue bicycle.

He stated that he did not.

We then asked him, does he recall the evening hours of Sunday, late Sunday evening hours, and the early morning of Monday, which would have been November the 6th, 1978.

He stated that on that particular day, he left his residence and he went out, and that he had gone to a U Tote'm somewheres on West Dixie Highway.

Again he was asked if he owned a blue, ten-speed bicycle, and he stated, "No."

At that particular point, he was then confronted with the fact that myself and Detective Zatrepalek had spoken with his brother, Elijah Gibson, and that Elijah had informed--

MR. ZENOBI: Objection.

THE COURT: Overruled, counsel.

Q [By Mr. Stelzer] Go ahead.

A --informed us that on Monday--

MR. ZENOBI: Objection.

THE COURT: It is not being offered for the truth of what was said.

Overruled, counsel.

Q [By Mr. Stelzer] Go ahead, Detective.

A --on Monday, Elijah had seen him with a bicycle that he brought over to his residence.

At that point, Mr. Breedlove stated that he did not have a bicycle and that Elijah was not telling the truth.

I then confronted him with the fact that his mother, Mary Gibson,had informed Detective Zatrepalek---

MR. ZENOBI: Objection.

THE COURT: Sustained as to the fact.

You can say what somebody said. It is not offered to prove the truth of the matter asserted, but you may not state it as a fact.

A That his mother had advised Detective Zatrepalek of the same thing that Elijah had.

MR. ZENOBI: That is hearsay.

Objection.

THE COURT: Overruled.

Q [By Mr. Stelzer] Go ahead, Detective.

A He then stated that--

Q "He" being the defendant?

A "He," Mr. Breedlove, then stated--that in fact he

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was at the U Tote'm on West Dixie Highway, and that while he was at the U Tote'm, he had bought some MD 20/20 or some Thunderbird wine.

Q MD 20/20 or what?

A Thunderbird wine.

Q Did he specify what Thunderbird wine looked like or anything?

A No, sir. He just said, "MD 20/20 or Thunderbird wine."

He then stated that he was walking home. As he was walking on 146th Street, he said that he was tired of walking and he saw a bicycle, and the bicycle was on the ground in front of a residence.

Q On what street was that?

A 146th Street.

Q What street did the homicide take place on?

A 146th Street.

Q Go ahead.

A And that he picked up the bicycle and rode it home.

We then asked him where did he put the bicycle.

He said he rode it home at that particular time.

We then asked him what he had been wearing on Sunday night, the early morning hours of Monday.

Q If I could stop you for a minute, did you ever ask the defendant what time it was on Sunday night or early Monday

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morning that he had picked up the bicycle and taken it home?

A Yes, we did.

Q What did the defendant reply?

A He said, "In the early morning hours."

Q All right, sir. Let me ask you one other question, during the course of your investigation, did you and your partner, Detective Zatrepalek, go by this U Tote'm store on West Dixie Highway that the defendant was taking about?

A We did.

Q How many U Tote'm stores are there on West Dixie Highway in this general area?

A Approximately four.

Q Did the defendant specify the one he had gone to?

A Just a U Tote'm on West Dixie Highway.

Q In order to get to the defendant's house from any U Tote'm store on West Dixie Highway, is the scene of the homicide in that route?

MR. ZENOBI: Objection as to the form of the question.

THE COURT: Overruled, sir.

Q [By Mr. Stelzer] Do you understand what I am getting at?

A Yes, sir. No. He would have to--depending on how the person would walk, normally you would not have to go by there. There is, however, one U Tote'm which is on Northeast

I then reiterated to him that I did not believe his story with regards to the blood on his pants, with regards to the pants being cut off; that I did not believe the story about that he did not do anything else on that particular night.

I then asked him again where was the bicycle taken from, at which time the defendant looked at me and stated, "I took the bicycle two doors down from the murder,"

Now, I was taking notes at the time--

Q "two doors down," I am sorry?

A "from the murder." --I was taking notes, so I wrote that down on my spiral notebook, which I use when I interview people.

I then continued asking him with regards to the blood on his pants and with regards again to try to see if he would tell me about the bicycle, at which time Detective Zatrepalek re-entered the room and sat down.

Rather than stopping the interview, I just took my notes and showed them to Detective Zatrepalek, indicating it by placing a circle around the quotation or the statement made to me, as to what he had said when Detective Zatrepalek was not in the room.

Q What was it that you put a circle around?

MR. ZENOBI: Objection; repetitious.

THE COURT: Overruled, counsel.

A "I took the bicycle two doors down from the murder."

We then started backtracking, and taking again the items that he had told me before and tried to see if he would continue to speak with us.

We then again asked him about the rhinestone watch, and again he told us that his brother was lying and that was not the truth.

We then asked him about the blood on his pants. He told us it was because of a fight.

I asked him why he had cut his pants off.

He told us there was blood on them.

I asked him if that was from the fight.

He stated, "Yes."

We then told him that we felt that the blood on his pants was not in fact from the fight, but from when he entered the residence.

At which time, Mr. Breedlove stated to us, "I believe you are trying to frame me. I believe you are trying to pin a murder on me."

I said, "We are not trying to pin anything on you. We are trying to find out what the truth is."

At this time, he said, "I suppose the blood on my pants, you are going to say, comes from the man inside the house?"

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Q Up until that point, had any mention been made of what sex the person was who had been stabbed inside of the house?

MR. ZENOBI: Objection to the form.

It is leading.

A No, sir.

Q [By Mr. Steizer] Continue.

A We then, at that time, again started questioning with regards to the blood on the pants, with regard to the bicycle, reiterating each individual point.

He then stated to us, "You cannot prove that I was in that house. You can't prove it. Take my fingerprints. You'll find that my fingerprints are not in that house."

We said, "Why are you saying that, McArthur?"

He said, "Because I was not in that house."

We then continued talking to him about the statement, "I suppose the blood on my pants came from the man inside the house."

We reiterated that quotation to him, and he stated that he had made a mistake; that one of us had informed him who had been stabbed, at which time we told him, "McArthur, we have not told you who was in that house, whether it was a man or a woman or anybody."

We again reiterated the portion about the watch and the portion about the statements that had been made to us

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previously to speaking with McArthur.

We continued along that conversation, and shortly thereafter, Detective Zatrepalek left the room.

Q Do you know why it was that Detective Zatrepalek left the room this time?

A Yes, sir. There was a phone call summoning him for something.

Q Something unrelated to this case?

A Yes.

At this time, Charlie Zatrepalek left the room. We were conversing with McArthur with regards to fingerprints.

Q What was the conversation at that point between you and the defendant about fingerprints?

A At that particular point, McArthur was saying that "My fingerprints are not in that house. You won't find any fingerprints in that house."

I asked him, "Why?"

He says, "Because you won't find those fingerprints in the house."

I again backtracked and started talking about the items, the bicycle, the blood on his pants, and so forth.

I then asked him, "Are your fingerprints in that house, McArthur, because if they are, we are going to find them?"

He stated, "You are not ~~going to find them~~ because

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I was wearing socks," which at that time, I then said, "What kind of socks were you wearing?"

He didn't answer.

I said, "Why were you wearing socks on your hands?"

He didn't answer. He said, "You're not going to find my fingerprints. Why don't you take my fingerprints."

At which time, I stopped and I took him upstairs to the fourth floor, where the fingerprint department is, and in fact took his fingerprints.

Q Who was it that you saw on the fourth floor of the Dade County Public Safety Department?

A I saw George Hertel, who was the fingerprint identification man who was on duty on that particular night.

Q Do you remember approximately what time that was, give or take a half an hour?

A Anywheres between 7:00 and 7:30. The exact time, I don't know.

Q Again, was there any further conversation at that point?

A Not while we were upstairs, no.

Q How long was it that you were upstairs with the fingerprints being taken?

A Approximately 15 minutes.

Q Did Mr. Hertel have any difficulty getting the fingerprints?

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A Yes.

Q After that 15 minute period of time upstairs, what happened?

A We returned back downstairs in the same office. I started speaking with him, at which time Detective Zatrepalek walked in.

At that point, again, since he had walked out of the room for a certain period of time while I was conversing with Mr. Breedlove, I showed Detective Zatrepalek my notes and circled the items I felt were important at that time, and I showed him the notes rather than telling him in front of McArthur.

We then started again conversing with him to see if he would say everything again; however, at this particular point, McArthur was not responsive to our line of questioning, and he went on to speak about other things that had occurred to him at other times.

Q Without telling us what those other things and other times were, did you have that conversation with the defendant--

A Yes.

Q --for a period of time on that evening?

A Yes, sir.

Q Did the defendant subsequently get placed under arrest that night?

A Yes, sir.

Q Do you remember what time it was that he was placed under arrest?

A Approximately nine-thirty, ten o'clock.

Q And the charges?

A First degree murder and burglary.

Q What sort of paperwork has to be gone through to place somebody under arrest?

A There is what we call an Arrest form, which gives the name, address, aliases, some personal history on the person, place of birth, tattoos, scars, mother's name, and so forth, and then it gives a general, small description of what occurred, so that when it is taken over to the State Attorney's office, they know what occurred.

Q Without going all the way through it, is it a fairly extensive amount of paperwork?

A Yes.

Q How long does it take, approximately, to fill out all of the forms and papers?

A Approximately an hour. It has to be signed by a supervisor to make sure it is all there.

Q How difficult is it to find a supervisor at that hour?

A It is difficult to find a supervisor who has a clerk stamp--who is a deputy clerk, who can stamp it and

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put the affidavit through.

Q After all that paperwork was done and all of the conversations were completed, was the defendant transported anywhere?

A Yes, sir. Myself and Detective Zatrepalek took Mr. Breedlove from our office to the Dade County Jail, located adjacent to our building.

Q Detective Ojeda, did there come a time shortly after that date where you were injured?

A Yes, sir.

Q Do you remember what date it was that you became injured?

A November the 11th.

Q A back injury, I believe?

A Yes.

Q As a result of that injury, were you off duty for some period of time?

A Yes, sir. I was on injury leave from November the 18th through December the 4th.

Q As a result of that, any investigation in that period was done by Detective Zatrepalek alone. Is that correct?

A Yes, sir.

Q Did everything you testified to today take place in Dade County, Florida?

A Yes, sir, it has.

Q The person you have been talking about all this time, McArthur Breedlove, do you see that person in the courtroom today?

A Yes, sir. He is sitting right there. The gentleman sitting between Mr. Zenobi and Mr. Levine [indicating

MR. STELZER: Indicating for the record, the defendant.

Q [By Mr. Stelzer] Thank you, Detective.

MR. LEVINE: If we could have a brief side bar before Mr. Zenobi begins his cross.

THE COURT: All right.

[Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the Court outside the presence of the jury and the following proceedings were had:]

MR. ZENOBI: I would like to bring to the attention of this Court numerous hearsay objections to the testimony of Elijah and Mary Gibson. We had no intention of raising any of that testimony in cross examination.

Since it has been brought up and since the Court has overruled our objection, we would like to go into that area without waiving any of our prior objections made on the direct examination.

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THE COURT: Well, the area to go into is the area of the factual basis that he related to them. Your going into it may take it out of the area that I have instructed the jury on relative to what he did for the purposes of arriving at what the defendant was confronted with, and I think the information he related to this defendant, you can inquire of as to its truthfulness or where he got it, but you have to understand that it may be received on a different basis by the jury than that which was related by this officer.

MR. LEVINE: It is our objection that it has already been received by the jury for an impermissible purpose. We feel it is impossible for them to do it, although the Court instructed the jury.

We feel we have to address and defend---

THE COURT: If you go into it with him, what he relates from those witnesses you are going to have to live with.

MR. LEVINE: We want to make it a point that we would not go into these areas but for the Court's ruling, and we feel we are compelled to do so.

THE COURT: You do what you feel is appropriate.

I am telling you that what this officer told him was not offered as a factual basis for anything. It was for the purpose of this jury's understanding.

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You do it as you want.

MR. LEVINE: We did not want to be construed as waiving our objection.

We feel we must go into it.

THE COURT: That is your choice.

[Thereupon, the following proceedings were had within the presence of the jury:]

THE COURT: All right, counsel.

CROSS EXAMINATION

BY MR. ZENOBI:

Q Detective, I presume you wrote a report in this case. Is that correct?

A Yes, sir.

Q Do you have that report with you?

A No, I do not.

Q Is there any way you can get that report if you had to?

A Yes, sir.

Q Does that report accurately reflect what you testified to in this case today?

A There is my report, which is a brief report, and the report of Detective Zatrepalek, which reflects most of the testimony that I have said here today.

Q Do you remember what date your report was signed on?

A No, sir.

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are not going to hear about all the things that were implanted in his mind. You are not going to hear about all the things that he was told and then just recited back, and you are not going to hear about how they did not tell him that he could have his public defender there on November the 21st.

Why were we not notified? Why were we not there? They knew we were his lawyers. Why were we not there? Does that make it a voluntary statement?

They had to hook up somebody in the house. There are six adults living in that house. You heard the statements about Mary and Elijah Gibson. Where were they? Where were those people? Did the State bring them in? Of course not, because what they would have had to bring in were two more suspects, and the only people you saw in here were the detectives.

Who would have been better than to bring in Mary and Elijah Gibson and say, "We heard this, we saw that on that night."

Would you not have wanted to see them? Again, a lack of evidence.

Would you not have wanted to hear from them? Would you not have wanted to hear how they supposedly saw McArthur Breedlove with this evidence?

Who would be the best person to tell you that?

They were available, but they were not here. Again, you had to get it from the detectives.

Was Elijah Gibson a suspect? You tell me. What did Detective Howard say about that address? What did Detective Howard say about that particular address?

"I knew about that address, because I had seen Elijah Gibson before for what he was arrested for, burglary." Burglary. Wouldn't you have liked to have seen him? Wouldn't you have liked to have known whether he was riding the bicycle; whether she was riding the bicycle?

Would you not have liked to have known whether there were any of his fingerprints on that bicycle? You never got a chance to see that, and again, where was your mind before Detective Ojeda and Detective Zatrepalek took the stand? There was no case. There was nothing.

When you left this courtroom Wednesday night, this was an empty case. You were wondering in your mind how they could connect that man to this crime.

They had to have Ojeda and Zatrepalek come in here, not only to tell you about their inconsistencies, but also to tell you some crap about what some people said who are not here to testify. That is the best place

to hear it--from the horse's mouth, and neither of those people came in here.

It is the mother and brother of my client. Why not bring them in here?

They are the State's witnesses, or they are supposed to be.

What is the involvement of the brother? What is the involvement of the mother? What is the involvement of the other adults in this house?

The State is going to have a chance to address you now, and all I want you to do is listen and pay close attention and have them answer the questions that I have raised to place that reasonable doubt in your mind and to suggest to you why the absence of this evidence amounts to a reasonable doubt.

I want to thank you for your time. You have been very attentive. It has been quite a long discussion. Thank you.

THE COURT: Mr. Godwin.

MR. GODWIN: One moment, Your Honor.

THE COURT: Go ahead, counsel.

MR. GODWIN: Good morning, ladies and gentlemen. This will be my only opportunity to address you on behalf of the State of Florida.

Let me, on behalf of Mr. Stelzer and myself and

BERT TOM

say that he did, and that is a simple answer to that.

Now, there were questions raised about one other thing, if I may. Detective Ojeda I think said he was injured two days after the 9th, which is the 11th. I do not know when he wrote his report, but you heard Detective Zatrepalek tell you the procedures. Sometimes a report is dictated on one day and typed up a month later. I believe that is what he was talking about. I do not know exactly when Detective Ojeda dictated his report.

The point is, he was not back to work and able to sign it until some time in January. That is another little red herring, smoke screen Mr. Zenobi would like to raise for you.

Ojeda was injured two days after the statement, and I believe he said he did not come back until some time in December, and Zatrepalek told you the procedures for having those reports typed up and how long it takes to get back to the police officers.

There were some questions raised about Mary Gibson and Elijah Gibson. Questions have been raised by Mr. Zenobi about the statements that Mary Gibson made to the police on November the 9th, and that Elijah Gibson made to the police on November the 9th.

He asked questions about those statements, and that

is proper. That is a fair issue for him to raise, and then he said, "Why didn't the State produce them as witnesses?"

I am going to answer both of those questions for you right now. The State Attorney's office is not in the business, ladies and gentlemen, of compelling a mother to come in and testify against her son, and in a first degree murder case, when we are seeking the electric chair. We are not in the business of doing that, if we can avoid it. We are not in the business of compelling a brother to testify against his own brother in a first degree murder case, where we are seeking the death penalty.

What would you expect these people to say if they came in here: "I don't know. I forgot. It's been a long time."

MR. LEVINE: Objection.

THE COURT: Overruled, counsel.

MR. GODWIN: What would you expect the mother of the defendant to say as a State's witness, or what would you expect the brother of the defendant to say?

I will tell you this, and you heard the testimony, both the mother and the brother gave sworn statements to the police on November the 9th, 1978. Detective Ojeda had the sworn statements in his report. We took

them out, and they are marked as evidence.

They gave their statements back on November the 9th. At that time, Mr. Breedlove was being interviewed by Ojeda and Zatrepalek. They gave their statements to another detective.

They did not know he was being charged at that point with first degree murder. They told the truth at that point.

You can rest assured of one thing; you can be as certain of this as you can that you are sitting in those seats right now: If the statements of Mary Gibson and if the statements of Elijah Gibson did not say exactly what Detective Ojeda and Detective Zatrepalek told you they said, Mr. Zenobi would have brought it out to you. He would have brought Mary Gibson in here and Elijah Gibson in here, and they would have told you, "We did not say those things."

MR. LEVINE: Objection.

I reserve the right to make a motion after the State's argument.

THE COURT: I will charge the jury on that, counsel.

MR. GODWIN: I believe His Honor, Judge Fuller, is going to instruct you that the State and the defense have the right to compel any person to appear in this Court

and testify concerning any case, and I will repeat it. The State and the defense have the right to compel any person to appear in this Court and testify concerning any case. It is not the duty of either the State or the defense to call every person who might seem likely to have some knowledge about this case and have them testify on the witness stand.

Let me just finish with the instruction, if I may: I believe His Honor will instruct you that it is the right of all parties in the case to call those witnesses whom the respective parties feel will contribute something material to the issues, and any omission to produce other witnesses does not raise any presumption that they would, if produced, testify adversely to either side in the case. You cannot assume that anyone who has not testified in this case would have testified one way or another.

Basically that instruction says that either side has the right to call witnesses.

Now, with respect to Mary Gibson and Elijah Gibson, who would be in a better position to testify for the defendant than his own mother and his own brother. if they had anything helpful to say, and that is why I would ask you to use your common sense and your ordinary good judgment. Do not---

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MR. LEVINE: Objection to that line of argument and reserve the right to make motions.

THE COURT: All right, counsel. Overruled.

Go ahead.

MR. GODWIN: Do not have any doubt whatsoever about what Mary Gibson and what Elijah Gibson told the police, because if there was a conflict, they would be ~~in~~ here telling you about it.

Now, Mr. Zenobi raised the question of what happened between November the 9th and November the 21st.

Detective Zatrepalek contacted Mr. Stelzer and contacted me, and he suggests that we conspired in some way against McArthur Breedlove. We have the obligation of presenting this case to the Grand Jury and discussing it with Detective Zatrepalek, and that is what happened in this case, and we stand up here and proudly tell you that we did that. We presented the case to the Grand Jury, as is our duty, and that is what was done in this case.

I do not know what Mr. Levine did on November the 14th. You have not heard any testimony. You heard suggestions from Mr. Zenobi. You have not heard any testimony from the witness stand about what Mr. Levine did on November the 14th. You have not heard any testimony from this person, Mr. Finger,

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MR. LEVINE: Before the jury is brought in, I feel I have to make some motions for a mistrial now, because the law requires us, in the event that the Court denies our motion, to ask to instruct the jury, so we would be too late to do it after the jury leaves.

I move for a mistrial on the following grounds, renewing all grounds we have already stated, but also on the grounds of the inflammatory arguments made during the prosecutor's closing argument.

The first objectionable part of the closing argument-

THE COURT: Your grounds were noted at the time.

MR. LEVINE: The objections were noted.

I understand the Court allowed me to note my objection and reserve my right to make a motion at this time rather than to interrupt the argument. I am stating my grounds for those objections at this time.

The first objectionable part of the argument was Mr. Godwin putting the truth of Elijah and Mary Gibson's statements in issue. He says, "This is what my notes reflect"--and I think the record will bear it out--"That those sworn statements were true, and if it was anything otherwise, Mr. Zenobi would have brought them in."

This is in spite of the Court's original instruction that these statements were not brought in for the truth. I do not think, although I am required to ask the Court

again to instruct the jury to disregard those statements, that I do not think the error can be cured.

I do ask, for the record, number one, that the jury be instructed to disregard that statement entirely. If the Court denies that instruction; number two, to instruct them that that statement was not coming in for the truth.

Furthermore, I would object and move for a mistrial because of the inference Mr. Godwin made about a potential rape. I think that is highly inflammatory and is not supported by the evidence, and the statement I am referring to is that the defendant, because of the purse, knew that there was a woman in there, and he was prowling around looking for that woman with a knife.

Now, number one, he is not charged with that. There is no evidence to support that. The only evidence before this Court and before this jury is contrary to that, and that argument and that inference that is clearly before the jury is so inflammatory and so prejudicial as to warrant a mistrial.

I would ask the Court to order a mistrial because of that, and if the Court denies that, to instruct the jury to disregard those arguments.

A further objectionable argument is characterizing this attack as animalistic. I believe the cases support

that comparing the defendant to an animal is improper argument and would warrant a mistrial.

I would ask the Court to declare a mistrial, and in the event that you do not, to instruct the jury to disregard that argument.

Furthermore, there was one other area: Mr. Godwin mentioned, in his closing argument, that the community should be free from this type of crime, and I believe the implication and the inference to be drawn from that is that in order to protect themselves, the jury must convict the defendant. I believe that is an improper argument.

It is asking the jury to place themselves in the position of being a victim of this type of crime. I think it is improper, prejudicial and warrants a mistrial.

I would ask the Court to declare a mistrial at this time.

In the event that you deny that motion, I would ask the Court to instruct the jury to disregard that entire statement, and the entire argument as a whole, and if the Court rejects each of the specific grounds I mentioned and the entire argument as a whole warranting a mistrial, I ask the Court to instruct the jury to disregard the entire argument, every word of it.

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THE COURT: Your motions for a mistrial are denied, counsel.

I think the context in which the argument was made was not prejudicial in nature.

Anything that is said by the prosecution the defense finds to be prejudicial, and I think the same holds true on the other side.

I instructed them on the issue as to the statements allegedly made by somebody else. I instructed them at the time that same evidence was introduced, and I think it was more effective at that time.

MR. GODWIN: May I make one more motion before the jury has been brought in? It has been brought to my attention that Mr. Zenobi apparently is intending to argue, in the final phase of his summation, that the police officers who testified here yesterday are members of the same police department that broke into a house a week ago with the improper---

THE COURT: I am sure Mr. Zenobi would not do that.

MR. GODWIN: I am requesting he not do it.

THE COURT: I am sure he would not do it.

We are all going to stay on the evidence in this case.

There is a lot of disparity between the opening statement which was made and that which was produced at

THE COURT: Sure. Of course.

Then I will read to them the preliminary instruction, the first paragraph on page 76.

So you have got the first paragraph on 75 and the first paragraph on 76, which will be read to them in just a moment, at which time we will proceed with the presentation of evidence to them.

I hope somebody is running off a copy of the charges upstairs; otherwise, we will take these and just run them off.

MR. LEVINE: We would renew all our pre-trial motions to dismiss the statute, that would provide for these instructions as being unconstitutional, and that they unconstitutionally limit the mitigating circumstances involved; in addition to renewing all our other arguments.

I would like to address now, with the Court's permission, the defense requested instructions, and I would like to take them one by one, if that is all right.

Has the Court read through those yet?

THE COURT: I read through the bulk of them. Go ahead.

MR. LEVINE: The first thing we would request is an alternate verdict form, and I have styled this as

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an advisory sentencing.

THE COURT: I have seen that. That was together with your motion to continue which I denied. You did not number that advisory verdict. I denied it. I have been through it, and I do not require the jury, in and of themselves, to make specific findings relative to whether they determine this or that to be a mitigating or aggravating circumstance.

MR. LEVINE: In the next requested instruction, I do not know what order---

THE COURT: You did not label them, but this one starts off, "The aggravating circumstances," the one I have first.

MR. LEVINE: All right.

THE COURT: And the second one I have is, "If you find."

MR. LEVINE: All right. Is it all right if I take them in the order I have?

THE COURT: Please yourself.

MR. LEVINE: Thank you. The first one I have starts out, "Evidence presented by the defendant."

THE COURT: Just a minute.. "That the capital felony"?

MR. LEVINE: "That the defendant never intended to kill the victim."

THE COURT: All right.

MR. LEVINE: I have that last one. It should have been the last one on there. It should read, "Stipulation by the State that the defendant never intended to kill the victim is a mitigating circumstance and you must consider it as such."

THE COURT: That is denied.

MR. LEVINE: The next one I have is, "Evidence presented by the defendant that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired is a mitigating circumstance and you must consider it as such."

I apologize for the order. I thought it was the same order as mine.

THE COURT: You gave me approximately fifteen instructions, none of which is numbered. I charge that what, now?

MR. LEVINE: Evidence presented by the defendant that the capacity---

THE COURT: Do not tell me more. I do not see that one.

MR. STELZER: I do not have that one either.

MR. LEVINE: It starts off, "Evidence presented by the defendant that the capacity of the defendant to

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appreciate"---

THE COURT: Wait a minute.

I have four copies of one of them here. Maybe everyone should get one copy of it. Maybe Mr. Levine has one copy of the one he is talking about now.

THE COURT: Who is going to handle the evidence phase, Mr. Levine?

MR. LEVINE: I will handle it, Judge.

THE COURT: Maybe Mr. Zenobi can go through the instructions you are requesting while we are proceeding with the jury, and maybe you can get them in order.

MR. LEVINE: I apologize. My secretary had the order mixed up.

THE COURT: We will give you a few minutes before we have closing arguments. Do you anticipate four or five hours on the evidence?

MR. STELZER: Definitely not.

THE COURT: Why do you not give them to Mr. Zenobi and let him relax.

Give those to Mr. Zenobi so you can just sit and do it at the counsel table.

MR. LEVINE: Can I show this to the Court?

This has been prepared by Mr. Stelzer. I presume he intends to use it during his final argument as to the

sentencing phase and I note an objection.

THE COURT: Your objection is noted. I will allow it to be used. It has the aggravating and mitigating circumstances.

MR. STELZER: It is a standard instruction.

MR. LEVINE: I am aware of that. I feel this compounds the error of the statute, as far as limiting the mitigating circumstances.

THE COURT: You have a charge in there, Mr. Levine, that relates to the limiting.

I have one that says, "You are not limited to those that are specified in the statute and you may use other matters that are not specified for those purposes."

MR. STELZER: I think, for the purposes of the preservation of the record, I should introduce this to preserve his objection, a smaller copy of that exact charge.

I am introducing an eight-and-a-half-by-fourteen copy of a chart which I intend to use only for the purposes of illustration.

THE COURT: Mark it as a State's exhibit. I am sure he wants a complete record.

MR. LEVINE: That is correct, Judge.

I would like the Court to address itself as to

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whether or not certain circumstances are not appropriate as a matter of law and whether or not the Court would direct the State that they cannot argue those.

THE COURT: We are not to argument yet. I do not know what the evidence is going to show.

MR. LEVINE: If the Court would allow me to renew that argument as to what has or has not been established immediately before we proceed with the argument.

THE COURT: We will take a couple of minutes to get your heads together on argument. At this time, we will discuss the charges Mr. Zenobi got together for us by order.

[Thereupon, the item referred to was marked as State's Exhibit No. 1 and received in evidence.]

THE COURT: Here is one of them.

I do want to read the first part of it to them.

MR. LEVINE: Just for argument's sake, we will invoke the rule as to the witnesses.

THE COURT: Those witnesses that may testify should be asked to wait outside, Mr. Stelzer.

Please do not discuss the case amongst yourselves.

Bring the jury in.

[Thereupon, the jury entered the courtroom, after which the following proceedings were had:]

THE COURT: Good afternoon, folks. I certainly

appreciate the promptness and courtesy you extended to us in being on time. It took a few minutes to get some ground rules straightened out.

So we will be able to proceed, I hope, without too much delay.

Now, you have found the defendant guilty of first degree murder. Now the punishment for this crime is either death or life imprisonment.

The final decision as to what penalty shall be imposed rests solely with the Judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

The State and the defense may now present evidence relevant to what sentence you should recommend to the Court, and you are instructed that this evidence, when considered with the evidence that you have already heard, is presented in order that you might determine first whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty, and second, whether there are any mitigating circumstances sufficient to out weigh the aggravating circumstances, if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be charged on

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the factors on aggravation and mitigation that you may consider, and a copy of them, of my instructions, will be provided to you at that time for your continued reference.

Does the State wish to offer any evidence?

MR. STELZER: Yes, Your Honor. The State does.

The State, at this time, will call Sergeant George Blishak of the Los Angeles Police Department.

THE COURT: All right. Ask him to come in, please, Counsel.

Right over there, please, sir. Please remain standing to be sworn.

Thereupon:

GEORGE W. BLISHAK

was called as a witness on behalf of the Plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STELZER:

Q Sergeant, would you please state your full name for the record and tell the members of the jury what it is you do and spell your name for the court reporter.

A George W. Blishak, B-l-i-s-h-a-k, sergeant with the Los Angeles Police Department, Los Angeles, California.

Q How long have you been with the Los Angeles Police

THE COURT: Call your next witness.

MR. LEVINE: I would like an objection and a side bar.

THE COURT: As relates to what?

MR. LEVINE: As to the next witness.

[Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the Court outside the presence of the jury and the following proceedings were had:]

THE COURT: Yes, sir.

MR. LEVINE: We would object to the testimony of Dr. Wright. Dr. Wright's name has never been provided to us.

This is an additional list of witnesses to the penalty phase, Your Honor.

MR. STELZER: Number seven on the additional list of witnesses for the penalty phase is the "Deputy Dade County Medical Examiner."

The problem is, Dr. Kessler is out of the country. Dr. Wright extensively reviewed all of his notes, and the testimony to be elicited from Dr. Wright concerns the amount of suffering that the victim did suffer and goes to the aggravating factor relating to heinous, atrocious, and cruel.

We did not know which medical examiner would

take his place. We listed by title as opposed to name.

THE COURT: His testimony is going to be that based upon the type of injury, that he is aware of a certain amount of pain or some such thing?

MR. STELZER: He has reviewed all of the notes testified to by Dr. Kessler and can offer his expertise as to pain and suffering that the victim encountered.

MR. LEVINE: The only medical examiner who came up in this case was Dr. Kessler, and his deposition was taken and we are not prepared for any testimony by Dr. Wright, and I think, of course, Dr. Kessler did in fact do the autopsy himself and has not just merely reviewed the file.

I think I have a right to expect that the person we deposed would be the person in court.

I think my defendant would be severely prejudiced. I think the Court should hold an inquiry as to why we were not provided with the witness on discovery.

THE COURT: I think he answered. Whether or not it is an appropriate substitute or not, that he is going to make opinions based upon the observations made by the other doctor---

MR. STELZER: No. He has photographs of the injuries. He has a complete autopsy report. He has reviewed the

entire file, and he is going to tell you that he feels competent, based upon his knowledge of this type of injury, to tell you what type of pain and suffering the victim had.

THE COURT: What value is it if you give a list of witnesses and have them anticipate one, and have somebody else give an opinion based upon the findings of another, assuming that this is in fact valid evidence?

MR. GODWIN: Maybe Mr. Levine will recall that I advised him that Dr. Kessler would be out of the country and we would have to call another doctor for this purpose.

I did not give him an exact name, but I did not know who it would be.

THE COURT: You know, we call for an exchange of witnesses for the purpose of giving each of you an opportunity to evaluate the other guy's witnesses in the penalty phase. That was to have been done this morning.

I do not know when Dr. Wright was discovered to be the one you all were going to use, but it seems to me that he would have to be made available relative to inquiry as to this.

MR. STELZER: First of all, it is totally proper,

according to the case law in Florida, to list somebody by job title.

We would have given the name of Dr. Wright if we had been sure it was going to be Dr. Wright to testify in this case.

Number two, there is no discovery in this phase.

THE COURT: I am aware of that.

MR. STELZER: Number three, Mr. Levine did not talk to any of my witnesses. He could have come down and talked to them.

I said, "Is there anybody you want made available today?"

He came down and three witnesses were there. Dr. Wright was not there. He was doing an autopsy.

Mr. Levine said, "If I want anybody, I will let you know."

I would have made anybody available.

MR. LEVINE: In response, I asked for a proffer as to what his witnesses would testify to, and I was led to believe that the three sitting there were the witnesses.

I laid that out, based upon the proffer of what Mr. Stelzer told me. Of those witnesses, two of them were excluded. I asked for a proffer and that is the proffer I got.

I think I am entitled to rely on a written pleading.

THE COURT: I am concerned. When did you all decide that Dr. Wright was going to be the witness to testify?

MR. STELZER: After the verdict on Friday, we contacted Dr. Wright by telephone and asked him if he could possibly be there. We did not know there was going to be a guilty verdict.

We knew Dr. Kessler was going to be out of town. That is why we put---

THE COURT: My only concern was, while there may or may not be a discovery provision in the penalty phases of the trial, I thought it had been well understood that we were going to exchange names of people, so if you wanted to talk to them, you could do it. If you do not want to talk to them, that is another thing.

I think they have a right to talk to Dr. Wright before he testifies.

MR. STELZER: We wanted to talk to their psychiatrists. They were never made available to us today.

Dr. Wright is here. I have no objection to them talking to him.

MR. LEVINE: In response, Mr. Godwin said if I would have given him a written report, he would waive

speaking to them.

THE COURT: My point is, the Judge should not be in a position of having to cross examine lawyers to find out who has done what and who has not done what.

Do you have another witness to call?

MR. STELZER: No.

[Thereupon, the following proceedings were had within the hearing of the jury:]

THE COURT: Folks, would you go into the jury room for a second while I chat with counsel.

It is getting hard to whisper.

Do not discuss the case.

[Thereupon, the jury retired from the courtroom after which the following proceedings were had:]

THE COURT: Now, talk to him outside Counsel, if you want to, please.

[Thereupon, a recess was taken after which the following further proceedings were had:]

MR. LEVINE: Before the jury is brought in, I would like to state this proffer---

THE COURT: Wait for the State Attorney.

MR. LEVINE: I thought Mr. Stelzer just walked in. I am sorry.

THE COURT: Have you had a chance to correlate

those charges yet?

MR. ZENOBI: Yes.

THE COURT: May I have my copy?

Go ahead, Mr. Levine.

MR. LEVINE: I would ask Mr. Godwin to make a proffer as to what the testimony of the medical examiner would be.

THE COURT: Apparently you have talked to Mr. Godwin. What areas do you feel are inappropriate that cannot be handled by an objection?

MR. LEVINE: One area that is particularly inappropriate and not provided for by law is the pain and suffering involved in death by electrocution.

THE COURT: What aggravating or mitigating circumstance does that relate to?

I think at this stage in the proceedings, that is not an issue. The issue is as relates to aggravating and mitigating circumstances in this case.

MR. LEVINE: That is my position, Judge.

THE COURT: All right. You just won it. Argue some more and you will lose it.

I do not allow you people to put on that evidence for the purposes of mitigation either. It is obviously for the purposes of inflaming the jury.

If you want to put it on, we will preserve the

record.

MR. LEVINE: Also, the State wanted to go into what would be the manner of death if the State were to legalize death by injection.

THE COURT: We are here on the aggravating circumstances as relates to the death of the individual here. Mr. Levine's points are well taken.

MR. LEVINE: Also, I ask the Court to make an inquiry into the qualifications of the doctor as to whether or not he is qualified and competent at this time to give evidence based upon what he has received in this case with no firsthand knowledge.

THE COURT: I decline to make such a judicial---

MR. LEVINE: Can I go ahead and do it?

THE COURT: Do you want to ask him some questions for that purpose? I think you may be using some time. I obviously feel as though he---

MR. LEVINE: We would like to make an inquiry outside the presence of the jury.

THE COURT: Go ahead.

Thereupon:

RONALD KEITH WRIGHT

was called as a witness on behalf of the Plaintiff and, having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. LEVINE:

Q State your name, for the record.

A Dr. Ronald Keith Wright.

Q What is your position?

A I am deputy chief medical examiner of Dade County.

Q Did you have occasion to review the file prepared by Dr. Kessler on the autopsy of Frank Budnick?

A Yes, I did.

Q What if anything did you do with it?

A I reviewed the entire file prepared by Dr. Kessler and others.

Q Could you clarify that, Doctor. What others? Specifically, every single person that you might have considered in arriving at the opinions you are willing to testify to today?

A As to that, none others, if I understand the proffer of the State in this case. Although I reviewed the records in their entirety contained within this file, some of which were prepared by individuals other than Dr. Kessler as to---

Q You are referring to the photographs?

A No, sir.

Q Could you explain what you mean.

A Certainly. As to what I believe the State has called me here to testify about, which concerns the pain and suffering associated with a stab wound of this nature and associated with a fractured clavicle, that information is contained within the autopsy report of Dr. Kessler, and also demonstrated in the photographs prepared by Dr. Kessler.

Q Is there anything else that you considered?

A No, sir.

Q So then your testimony is that you never considered any of the testimony of any eye witnesses in this case. Is that correct?

A That's correct.

Q Thank you, Doctor.

MR. LEVINE: If I may have just one second, Judge. I do not have anything further.

I move to exclude this witness.

THE COURT: Motion denied.

Bring in the jury.

MR. LEVINE: One more thing, and I think this is also properly outside the presence of the jury: I presume this is going to show this crime is especially heinous, atrocious, or cruel, and directing the Court's attention to the jury instructions, "Heinous means extremely wicked or shockingly evil," and "Atrocious means especially wicked and vile," and I do not think

that is directed to pain and suffering.

"Cruel" means designed to inflict a high degree of pain, utter indifference or enjoyment of the suffering of others, pitiless, and I believe that if the doctor were to testify that because of the stab wounds, that the victim suffered a high degree of pain, I do not think that would be within the meaning of "cruel," because "cruel" means "designed to inflict pain," and the State has stipulated that the defendant never intended to kill the victim. How could they support the testimony that this was designed to be cruel?

The fact that it was incidentally cruel or painful is not a consideration.

Furthermore, I would cite 322 So.2d 557, in which the Court held that a killing is not especially heinous, atrocious, or cruel simply because it is unnecessary, and Cooper v. State, which says that the standard of the aggravating circumstances is whether the horror of the murder is accompanied by such additional acts to set the crime apart from the norm; so, even if the doctor were to testify as to the amount of pain and suffering, it is totally irrelevant to any aggravating circumstance.

THE COURT: Your objection is noted.

Overruled.

[Thereupon, the jury entered the courtroom after which the following proceedings were had:]

THE COURT: All right. In your absence, this witness has been sworn, so you may proceed, Mr. Godwin, please.

Thereupon:

RONALD KEITH WRIGHT

was called as a witness on behalf of the Plaintiff and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GODWIN:

Q Would you please state your name and spell your last name and tell the members of the jury what your occupation is.

A Certainly. My name is Dr. Ronald Keith Wright, spelled W-r-i-g-h-t. I am a deputy chief medical examiner for Dade County, Florida.

MR. GODWIN: May I ask the court reporter to move over a little bit so I can see the witness.

Q [By Mr. Godwin] Doctor, as the deputy chief medical examiner for Dade County, are you the second in command?

A That's correct.

Q How long have you been with the medical examiner's

office?

A Since August of 1974.

Q Would you tell the members of the jury what your background is, what training you have had for the position you now hold.

A Yes. I have a bachelor's degree in biology and chemistry. I have a doctor of medicine degree. I completed training in the field of pathology, specifically anatomic pathology, which is that area of medicine having to do with the diagnosis of disease, primarily through the examination of tissues of the human body, both gross, with the eye, and microscopically; clinical pathology, which is that area of pathology having to do with the diagnosis of disease, primarily through the use of laboratory testing of body fluids; and forensic pathology, which is that specialty of pathology having to do with the investigation and the determination of the cause of death of individuals who die suddenly and unexpectedly, or who die as a result of injury.

I am certified by the American Board of Pathology, which is the accrediting and certifying organization in the United States, in each of those three specialties; that certification following examination and testing.

I am licensed as a physician in the States of Missouri, Vermont, and Florida and I am a member of the board of directors of the National Association of Medical

Examiners, and in addition, I am on the Forensic Council of the American Society of Clinical Pathology.

Q Do you hold any teaching positions?

A Yes. I am an associate professor of pathology at the University of Miami School of Medicine, and I am also an associate professor of epidemiology and public health at the University of Miami School of Medicine.

Q Are you the supervisor of Dr. Stanton Kessler?

A Yes, sir, I am.

Q Do you have with you today, Doctor, the official files from the Dade County Medical Examiner's office compiled by Dr. Kessler with respect to the death of one Frank Budnick?

A Yes, sir, I do.

Q Have you had an opportunity to review those files?

A Yes, sir, I have.

Q Have you read over the autopsy report that was prepared by Dr. Kessler?

A Yes, I have.

Q Have you reviewed his notes?

A Yes, I have.

Q Have you reviewed his notes?

A Yes, I have.

Q Can you tell the members of the jury approximately how many autopsies you, yourself, have performed.

A About 2,800.

Q Can you tell the members of the jury approximately, if you know, how many autopsies you have performed that involved knife wounds to the victim?

A Probably only about 250.

Q Can you tell the members of the jury, if you know, approximately how many autopsies you have performed that involved a broken bone or a fractured bone, particularly the clavicle, that you know?

A As to a fracture of the clavicle, probably only a hundred to 200. As to broken bones in general, probably seven or 800.

Q Doctor, based upon your training and your experience and based upon your review of the particular file involving the death of Frank Budnick, would you be able to tell the members of this jury, within a reasonable degree of medical certainty, as to what degree of pain and suffering, if any, Frank Budnick suffered prior to his death.

MR. LEVINE: Objection and renew all the grounds made pre-trial as to competency and relevancy.

THE COURT: Objection is noted.

Overruled.

You may answer, if you can.

THE WITNESS: Thank you, Your Honor.

A Yes, sir.

Q Doctor, if I may, before you actually give us your answer, let me ask you to assume the following facts in this case: Assume that the victim, Frank Budnick, had gone to sleep at approximately twelve o'clock midnight and slept until approximately three o'clock in the morning; assume that he had taken no drugs or medication other than some Tylenol; assume that he was in his bed asleep when he was first awakened and when he was stabbed with this weapon, which is in evidence as State's Exhibit 37; assume that after he was stabbed, he began to jump around in the bed and actually crawled down the far side of the bed from where he was stabbed.

MR. LEVINE: Objection and move to strike.

THE COURT: Overruled.

Motion to strike is denied.

Q [By Mr. Godwin] Assume he was able to get out of the bed and to walk out of the bedroom, walk around the corner out through the living room, and he was able to open the door and walk out into the front yard, and actually out towards the street, and he was able to give out a loud guttural scream, and then he fell to the dirt and the gravel; and assume further that when a person reached him and tried to administer aid to him, that person tried to speak to him, and that that person said he was trying to speak, but only gurgling and bubbling was coming from his mouth and

blood was coming from his mouth.

Assuming those facts, and again based upon your experience and your expertise and your review of the particular record in this case, can you tell the members of the jury exactly what sort of pain and suffering Frank Budnick would have gone through?

A Yes.

In response to that question, I believe it would be best to characterize this as considerable. The mechanism of death is one of the factors with which we are concerned here; that is, the physiologic or biochemical abnormality produced by the cause of death, which leads to death.

The stab wounds of the upper left chest entered in the upper left chest, going through and fracturing the clavicle, or the collarbone.

It then proceeded down--the knife proceeded down--through the lung, and then stopped in the back side of the back.

In the process of the stab wound, there was a transection or a cutting in two of the subclavian--or below the clavicle--vein. In addition to that, there was this penetration of the lung itself.

The mechanism of death is really twofold in this case.

Number one, the bleeding to death from the wound

to the vein, which is a considerably large vein, which drains all of the blood from the upper arm and part of the upper chest; at the same time, there being a condition essentially of drowning, from the standpoint of the wound in the lung causing it to bleed internally; this bleeding within the lung then being breathed into the rest of the lung tissue, causing the sensation, and the same kinds of autopsy findings as one sees in an individual who drowns in some other kind of environment.

From the fracture of the clavicle with the penetration of the portions thereof into the pleural lining space and the perforation of the pleural lining space itself, this is associated with considerable pain. The pleural lining spaces, the lining around the lungs, are particularly heavily endowed with pain fibers, which are relayed to the brain.

In addition to that, this man also suffered from the standpoint of having the sensation of drowning during the same time period.

Q Doctor, when you say "drowning," are you saying that this man drowned in his own blood?

A That's correct. That's one of the two mechanisms which were at play from the stab wound.

Q And the other was?

A Bleeding to death internally.

BERT FRIEDMAN TOM LOMBARDI

Q Doctor, what sort of pain, if any, is associated with fracture of the clavicle, as resulted in this case?

MR. LEVINE: Objection; repetitious.

THE COURT: All right. Overruled.

A Again, bone fractures are the kind of pain associated with something called, in medicine, "Deep pain," because they are supplied by a kind of nerve fiber that goes to a special area in the brain. As far as where the pain fibers end and how they are perceived, that is different than superficial pain.

This again would be considered to be considerable pain from this kind of wound.

Q Did you also note some injury to, I believe, the right hand of Frank Budnick?

A That's correct. There were five incised wounds, characterized as "Defense wounds" by forensic pathologists, on the palmar side, or the palm side, of his right hand.

Q What opinin , if any, could you give the jury with respect to any pain and suffering relative to those wounds?

A Relatively superficial wounds and a relatively minor amount of pain associated with that.

A Assuming the facts I gave you before--that the victim actually walked outside and screamed before he fell--would you say he had to be conscious in order to do that?

A Yes, sir.

Q Finally, Doctor, based upon your training and your experience, would it be fair to say, within a reasonable degree of medical certainty, that in this particular case, the victim, Frank Budnick, did in fact suffer a high degree of pain which he was conscious, before he died?

MR. LEVINE: Objection; repetitious.

THE COURT: I think it is repetitious, Counsel.

MR. GODWIN: One moment.

Q [By Mr. Godwin] Based upon the facts that I have asked you to assume, as well as your review of the autopsy notes in this case, can you tell the jury approximately how long the victim would have been conscious in this case from the moment he was stabbed.

A In this kind of wound, it would be, as a minimum, a matter of a minute or so, to a maximum of several minutes.

MR. GODWIN: No further questions.

THE COURT: Cross, please.

CROSS EXAMINATION

BY MR. LEVINE:

Q Did you ever talk to Dr. Kessler personally?

A Yes.

Q Did you examine the body personally, yourself?

A I cannot recall.

Q You do not remember?

A That's correct.

Q Doctor, I think you just testified that there was a fairly wide latitude in how long a person would be conscious.

A That's correct.

Q Did you talk to any eye witnesses in this case?

A Not personally, no, sir.

Q You did not consider that in your findings, did you?

A No, sir, I did not.

Q So you really do not know how long this man remained conscious and how long it took him to die, do you, within a few minutes latitude? It could have been as little as one minute. Is that correct?

A That's correct.

MR. LEVINE: Excuse me, Judge, for one minute.

THE COURT: Anything else?

MR. ZENOBI: No.

MR. LEVINE: No further questions.

THE COURT: Anything else?

MR. GODWIN: No further questions.

THE COURT: Call your next witness, please.

[Witness excused]

MR. STELZER: At this time, the State would rest on the penalty phase.

BERT FRIEDMAN TOM LOMBARDI
DALE GENDRON

THE COURT: The defense, please.

MR. LEVINE: If we may have one moment.

THE COURT: Go ahead.

MR. LEVINE: The defense would call Dr. Benjamin Center.

Thereupon:

BENJAMIN CENTER

was called as a witness on behalf of the Defendant and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEVINE:

Q Could you state your name for the record, Doctor.

A Benjamin Center.

Q What is your occupation?

A I am in the area of psychology, forensic work, neuropsychology.

Q Could you tell the jury what your training is.

A Yes. I have a number of degrees.

Q What are those degrees?

A As a psychiatric social worker, as a special pathologist, as an educational psychologist, optometrist--eye doctor--and I have a Ph.D in learning disabilities and mental retardation.

Q Have you done much forensic psychology or criminal

psychology?

A I have done some, yes.

Q Tell the jury what your experience is in that area.

A Well, I have examined at least, I would say, thirty cases in the last year.

Q Within the last year?

A Yes.

MR. LEVINE: We would proffer this doctor as an expert.

Does the State stipulate?

THE COURT: He will be received, for the purposes of his opinion, subject to cross examination by the State and the jury's evaluation under the appropriate charges.

MR. GODWIN: Could he indicate as to what area he has been proffered under?

THE COURT: What is the area of expertise?

MR. LEVINE: As a psychologist.

THE COURT: Go ahead, please.

Q [By Mr. Levine] Did you have occasion to examine a McArthur Breedlove?

A Yes.

Q Do you see him in the courtroom?

A Yes.

Q All right, Doctor. Where did you examine the defendant?

A The Dade County Jail.

Q How long did you spend with him?

A Seven hours.

Q Seven hours?

A Yes.

Q During those seven hours, what tests, if any, did you perform on the defendant?

A I gave him an intelligence test, an educational achievement test, and the Halsted---

Q Let me interrupt you here, Doctor. Could you tell the jury what that test is?

A That is a test that measures the adaptive behaviors of the individual, those particular brain functions related to behavior.

Q Did you perform any other tests?

A A Bender-Gestalt and a Rorschach.

Q What is the Gestalt test that you mentioned? Could you explain that to the jury.

A That is a test comprised of nine diagrams, in which the individual, the subject, copies them, and the information gathered from that is primarily psychological in nature.

Q What is the purpose of that test, Doctor?

A Screening for perceptual difficulties; screening

for possible neurological difficulties; screening for intellectual function.

Q Doctor, would you tell the jury what the result or results of each test were.

A The tests were interwoven, and the results are not something that you just take a piece here and take a piece out there, but together; but, the results of my tests were--

Q Excuse me. Go ahead.

A --in terms of the intelligence test, I found McArthur to be in the dull-normal range of intellectual functioning.

Q What else did you find?

A I found, in examining the particular intelligence test, that he had difficulty with manipulation of thought patterns, concepts; difficulty in remote memory and grasping concepts.

Q What did that indicate to you?

A Well, it suggested there was something wrong in understanding what was going on, insight as to the particular moment, at least in terms of the testing mode.

Q Did you come to any other findings?

A Yes. The other particular findings, in the additional test, the Halsted neuropsychological test battery, which is, as I mentioned, a test of behaviors. Breedlove

earned what we call a Halsted impairment of .8, which means eighty percent of the test scores fell in the brain dysfunction range.

Q What did that indicate to you?

A It indicates he had brain dysfunction.

Q Doctor, comparing all of the tests and taking into consideration your interview with the defendant over those seven hours, did you come to an opinion, to a medical certainty, as to whether or not the defendant suffers from an extreme mental or emotional disturbance?

MR. GODWIN: Objection.

He said, "Based upon a medical certainty."

Q [By Mr. Levine] A psychological certainty.

THE COURT: Go ahead, with that change.

A Yes. I feel that the information that I have infers that he has emotional problems.

Q [By Mr. Levine] All right, Doctor. Did you also form an opinion, to a psychological certainty, as to whether or not the defendant has the capacity to conform his conduct substantially to the requirements of the law?

Do you want me to repeat the question, Doctor?

A Yes. I am having trouble understanding it.

Q Did you reach an opinion, to a psychological certainty, as to whether or not the defendant was substantially impaired in his ability to conform his conduct to the

requirements of the law?

A He has definite impairment.

Q What causes you to believe that he has this impairment?

A The neuropsychological test battery; the sub-tests that comprise that particular battery.

Q Doctor, from what you know about the patient, how would he react to a stress situation?

A In two ways, from the data that I have. Number one, either he will withdraw, or if he got involved in the stress, he would act inappropriately.

Q Doctor, based upon what you observed, could you tell us what the prognosis for improvement in the defendant's mental condition would be if he were to receive extended and intensive psychiatric treatment in a custodial thing like a prison?

A I think the prognosis would be favorable.

MR. LEVINE: Just a moment.

Your witness, Counsel.

THE COURT: Cross, please.

CROSS EXAMINATION

BY MR. GODWIN:

Q You are not in a position, is it correct, to offer a medical opinion as to whether McArthur Breedlove has any sort of brain damage, are you?

A No, sir.

Q You mentioned something about brain dysfunctions.

A Yeah. Brain dysfunction.

Q Can you tell us what you mean by that in layman's terms?

A Right. The test is measuring the behaviors that a person has; behavior like the insight concept and motor skills.

Q It does not measure whether or not he has any organic brain problem. Is that true?

A That inference would not be made--- The test has validity in making that inference, but I would not make that inference.

Q Mr. Levine asked you, and I understood his question to be whether or not you felt Mr. Breedlove was suffering from some sort of an impairment of his mental facilities, so that he could not conform his behavior to the requirements of the law. Is that essentially what you understood the question to be?

A I think I understand that, yes.

Q You did prepare a report in this case, did you not?

A Yes.

Q I believe a three-page report. I show you the copy I have, dated February 28th.

A Yes.

Q Did you find that the defendant, McArthur Breedlove, knew right from wrong at the time you examined him?

A Yes.

MR. LEVINE: Objection.

That is not the issue here.

THE COURT: Overruled.

Q [By Mr. Godwin] Did you find he was aware of the nature and consequences of the act of murder for which he was charged?

A Yes.

Q A person who knows right from wrong, who is aware of the nature and consequences of his acts; a person in that position would be in a position to say, "Yes, I am going to do it," or "No, I am not going to do it," would he not?

A I would have to answer that, it would depend if there were brain damage or if you were mentally retarded. You could know right from wrong and still act in a manner that would be inappropriate.

Q Well, we agree you have no evidence Mr. Breedlove suffers from brain damage, correct?

A I have evidence that he has brain dysfunction.

Q But you have no medical evidence that he suffers from brain damage. Is that correct?

A No. That's correct.

BERT FREEDMAN TOM LOMBARDI DALE GENDRON

Q And you agree he knows right from wrong.

A Yes.

Q And you know of nothing in Mr. Breedlove's background that would prevent him from saying, "No" to a criminal act, do you?

A I don't know.

Q Doctor, in forming your opinion as to Mr. Breedlove's personality problems, emotional problems, I believe you characterized them, did you have an opportunity to read over the confession that he gave in this case?

A No.

Q The confession dated 11/21/78, some fifteen days after the crime?

A No.

Q Would you know whether or not, in the confession, he attempted to minimize or down-play his part in this crime?

A Would I know if he would attempt to do that?

Q Would you know whether or not he did attempt to do that in his confession?

MR. LEVINE: Objection.

He has not read it.

THE COURT: Sustained.

Q [By Mr. Godwin] Did you talk to any police officers who spoke to Mr. Breedlove in this case?

A No, sir.

Q Did you talk to his mother in this case, if you recall?

A His mother did call me on the phone.

Q Did you talk to his mother and his brother?

A No. I didn't know he had a brother.

Q Did you ask his mother or his brother about his behavior immediately after the crime, the night he returned home?

A No. I posed no questions whatsoever to them concerning the case.

Q Doctor, do you know what Mr. Breedlove is charged with--

A Yes.

Q --and convicted of?

A Yeah. First degree murder, as I understand it.

Q As well as burglary. Are you aware of that?

A Yes.

Q He went into a house, and in the course of a burglary, he stabbed someone to death.

A I knew the charges.

Q Assuming that prior to going into the house, Mr. Breedlove put something on his hands so as not to leave any fingerprints; assume that after he commi[illegible]nd the crime of burglary and then stabbed a person to death, he ran out

the back door and ran two houses down and stole a bicycle and took the bicycle to make his escape, would that assist you in forming your opinion as to whether he knew right from wrong and was trying to avoid the consequences of his acts?

MR. LEVINE: Objection.

He stated the defendant knew right from wrong.

That is not the issue.

THE COURT: As relates to the second part of the question, he has answered the second part of the question, as to whether he knew right from wrong.

Q [By Mr. Godwin] You may answer.

A Would you restate that, please?

THE COURT: Do those factors aid you in determining whether or not he understood the criminality of his conduct?

THE WITNESS: It might have been helpful.

Q [By Mr. Godwin] Doctor, assuming that after he stole the bicycle and returned to his house, he took off the bloody clothing he had on and disposed of that, and at a later time, disposed of the jewelry he had taken so it could not be found in his possession, and assuming he had given a false name the next night when stopped by police officers, would that help you in reaching an opinion as to whether or not Mr. Breedlove knew the criminality of his

conduct at the time he did it?

A I tend to do my evaluations blind, in the sense that I have the charge, and I understand what I am supposed to do. Then I do the examination, and my inferences and conclusions are based only upon those particular findings which I have attempted to obtain as objectively as possible.

Q I understand that.

My question is, would this other information have assisted you in reaching your findings?

A I would say possibly. I really don't know.

Q Would not these factors I just mentioned to you, the flight from the scene of the crime; the fact that he got rid of the bloody clothing; that he got rid of the jewelry; that he gave a false name, wouldn't that indicate a person conscious of the criminality of his acts and who is consciously trying to avoid detection for his crimes?

MR. LEVINE: Objection.

Again, asked and answered, number one; number two, not directed to the issue here.

Right from wrong is not an issue at this hearing.

THE COURT: Overruled as it relates to the question you brought up relative to the criminality of his conduct.

On that basis, I will allow it.

A Based upon the impairment, as I understand it,

his behavior would be inappropriate. He would act inappropriate.

Q [By Mr. Godwin] Would you say he is a sociopath?

A I would say that socially, in terms of his inability to profit from experience, he would probably be pathological.

Q But would you say he is a sociopath?

A No. I am not ready to use the term "sociopath."

Q Did you have an opportunity to check into Mr. Breedlove's prior background in California?

A No, sir.

Q Do you know what psychiatric treatment, if any, he received in California?

A No, I do not.

MR. GODWIN: Can you give me one second, Your Honor?

Q [By Mr. Godwin] Doctor, would your opinion as to whether Mr. Breedlove can appreciate the criminality of his conduct, be different if you knew he was in prison in California for at least two years and underwent whatever the rehabilitative services were in the prison; he was released after two years on parole from a life sentence, and on parole he committed the same crime he has been convicted of today?

A No. My opinion would be the same.

Q Do you think he would do it again?

MR. LEVINE: Objection.

THE COURT: Sustained.

Anything else?

REDIRECT EXAMINATION

BY MR. LEVINE:

Q Doctor, if you were told that the defendant was declared to be a mentally disordered sex offender in California, would that be inconsistent with anything you found?

A No, sir.

Q Mr. Godwin asked you whether or not you had arrived at an opinion as to whether he knew right from wrong. Does that have anything to do with whether or not his judgment was impaired?

What I am asking, Doctor, is, if the question is not clear, can somebody know right from wrong and still have impaired judgment and inability to conform his behavior?

A Yes.

MR. LEVINE: No further questions.

THE COURT: Thank you.

You are excused.

[Witness excused]

THE COURT: Call your next witness, please.

MR. LEVINE: Call Dr. Levy to the stand, please.

THE COURT: Right over here, please, sir.

Thereupon:

ELI LEVY

was called as a witness on behalf of the Defendant and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEVINE:

Q Would you state your name and your occupation, please.

A Eli Levy. E-l-i L-e-v-y, psychologist.

Q Could you tell the jury and the Court what your training in the area of psychology is.

A I have an undergraduate degree in psychology, as well as graduate work in psychology.

I have two years post-doctoral supervision by a licensed psychologist, and I am a board licensed psychologist to practice in Florida.

Q What experience do you have in forensic or criminal psychology?

A I have been heavily involved in forensic work since September. I have been appointed to juvenile justice since September. I have been doing evaluations for the court, to assist as to their youngsters mental and emotional status. I have been involved in previous cases of custody,

as well as through individual evaluations for lawyers who hired me as a professional.

MR. LEVINE: We will proffer Dr. Levy as an expert in the field of psychology.

THE COURT: We will allow him to testify as such, of course subject to cross examination on his qualifications. Go ahead.

Q [By Mr. Levine] Did you have occasion to examine McArthur Breedlove?

A Yes, sir.

Q Do you see him in the courtroom today?

A Yes, sir.

Q Could you tell the jury what if anything your examination consisted of. What did you do?

A Well, my examination consisted of an interview through questions and answers, as well as a psychological evaluation.

Psychological evaluations consist of test material that we administer the particular human being, and we try to assess their behaviors.

For these tests, I spent with Mr. Breedlove about two hours and twenty minutes on two separate occasions.

Q Can you tell the jury what tests, specific tests, you gave the defendant.

A Okay. I administered the Wexler Adult Intelligence

Scale, which is basically a test which measures the intellectual capacity if the individual.

For this test, we try to assess the level at which a particular person is functioning; whether or not he understands what is asked of him; whether or not he can experience the environment and understand the environment and respond to the environment; whether or not the person is responding to the actual things we gave him, or if he is responding to something from within him; so, we are trying to assess whether or not this person is reasonably intellectual.

The second test is the Bender-Gestalt, which is a series of cards, and the instructions to the testee is, "Please copy these signs as you see them."

Through observing the person who is taking the test, we can assess whether or not the person has any kind of neurological impairment, which would be in terms of his ability to copy these designs.

We can assess whether the person has any kind of mental deficiency by that.

Q Let me interrupt you here. Did you bring the tests with you?

A No, I have not.

Q Go ahead.

A The third test is the Bender-Gestalt recall.

Basically, after we give him these designs, we take them away, and we ask him to put them down from memory, and we can assess whether or not the person has good recall of immediate things that happened.

The third thing we have given them is called the House-Tree-Person test. It has to do with--we ask the person to draw a house. After they draw the house, they draw a tree, and after he finishes the tree, they draw a person. If he draws a male first, we ask him, "Is it male or female?" If he says it is a female, we ask him to draw a person of the opposite sex, for through this test we are able to assess personality and perception.

This is a projective technique, whereby we tell them to draw something, but they do not know what we are after in this drawing.

We feel they reflect to us and express to us their own thinking, feeling and the way they deal with themselves as well as with other people, as well as with external environments.

After we give them the achromatic pencil and paper, we give them the same thing, but use colors. The philosophy behind the colors is personality. We associate colors with emotions, and the colors the person uses will help us to understand some of his feelings for the moment.

After he finished drawing a house, tree, and a

person, and the person of the opposite sex, we compare his drawings with the pencil in relationship to his drawings with color, and through that, we are able to assess further the areas of difficulties; reminding you that a psychologist is basically trying to have samples of behavior, trying to understand the person from as many points of view as possible.

If you are able to use these instruments, you are sampling what the person is thinking, feeling, and how he acts.

The other test I have given him is the Rorschach, which is what we call again a projective technique. It is a series of ten cards. On each card there is an ink blot, and the instructions for the person are, "I would like you to look at these cards and tell me what you see, what it looks like to you. Hold it as long as you want. When you finish, I will give you the next one."

Through projective techniques, we are hoping that the person projects, in other words, out into the ink blot, some of his own thinking, his feelings, and the way he relates to the environment.

These are the tests that I have administered to Mr. Breedlove.

Q Doctor, based upon these tests, were you able to draw any conclusions?

A Yes.

BERT FRIEDMAN TOM LOMBARDI
DALE GENDRON

Q Can you tell me what those are.

A The conclusions that I was drawing from them were, first of all, I believe that Mr. Breedlove is suffering from neurological impairment. I think, through this testing, I was able to assess that he has an organic deficiency, which I believe is affecting---

Q Can you explain to the jury what neurological impairment is in layman's terms.

A Neurological impairment--reminding you that the brain is the center of all our life up here. We feel,we see, we touch, we smell, the whole of all our being and existence is in the mind and the brain. When the brain is damaged, meaning that some portions of the brain, meaning the cells,have been damaged.

In other words, certain parts of the brain are not functioning as well as they could function if that damage did not exist.

As a result of that damage--it depends on where it is, too--the person would be affected by this impairment.

For example, if a person is or has damaged a certain part of his brain, he would be unable to abstract. A person damaged in the abstract part of his brain would find it very difficult to grasp something abstract.

Other parts of the brain might be damaged where

the person would have a difficult time copying simple geometrical designs. From what he sees and what he does, you see a great discrepancy. They don't look the same. Okay.

Q Did you have a chance, during your interview with the defendant, to go into his past history relating to drugs?

A Yes.

In my discussion with Mr. Breedlove, he shared with me that he has a history of drug use. If I recall correctly, he told me that since the age of sixteen, he was using drugs, the whole gamut of drugs, and the last thing I remember, he was saying that the night of the alleged crime, he was using cocaine and mescaline.

Q With his professed history of drugs, is that consistent or inconsistent with the test results that you received?

A It's consistent with the test results I received, because I think Mr. Breedlove is also suffering from a schizophrenia, which is a form of mental disturbance.

By "schizophrenia," we mean a split personality, but the person isn't really split. What is split is his thinking, feeling, and acting level. In other words, the three are not synchronized together.

Do you follow me? The person might feel one thing

and the way he acts is not congruent. They are not together.

Furthermore, I found him to have also some depressive tendencies.

A person who is feeling very lonely, a person who fells rejected, a person who feels persecuted by the external environment, given these kinds of feelings perceived, the person will be using drugs to try to somehow or another cope with his feelings of inadequacy, poor perception of themselves, and their basic inability to do well with their lives, but to use such drugs coincides with my diagnosis of him.

Q During your examination with the defendant, did you go into the previous psychiatric treatment he received?

A He told me that while he was in California, he was in group therapy and he was receiving psychiatric treatment.

Q The fact that he has this impairment, or you mentioned schizophrenia, is all of this consistent with a long-standing mental illness, what you observed?

A Yes.

Q Did he relate to you how he got along with the other people? How he related to the other people?

A My impression of Mr. Breedlove is that he is a person who is basically a loner; a person who is afraid to get involved with other people.

Basically I see him as a person who has a very inadequate self perception. He basically doesn't think he is worthy of other human's companionship.

According to him, he spent most of his time alone. He tried to stay out of the way of other people, so to speak.

I asked him whether or not he was married. He suggested to me that he had never been married. He lived with her for a while, but he never had a long-standing relationship with another human being of the opposite sex.

Q Did you have any indication at all that the defendant was malingering?

A What do you mean?

Q That he was faking a psychiatric illness at all?

A No.

Q Based upon your evaluation of the defendant, are you able to reach an opinion, to a reasonable degree of psychological certainty, as to whether or not the defendant is suffering from an extreme mental or emotion disturbance?

A Yes.

Q What is that opinion?

A I think Mr. Breedlove is a paranoid schizophrenic in remission, meaning that at the present time, he is not acting out his illness.

I would like to remind the Court that during the time I examined him, he was under drugs, under medication, and even under medication, his personality decompensation came through; so, left alone, if he was not under medication, I believe I would have seen a much greater example of his pathology.

Q What medication are you referring to? Do you recall what he was taking?

A I don't recall. I think he was taking some Stelazine. I don't recall.

Q If I told you he was taking Mellaril, what would the results of Mellaril be?

A I am not a psychiatrist. I can't answer the question.

Q I will withdraw the question then.

Did you reach an opinion, to a reasonable psychological certainty, as to whether or not the defendant's ability to conform his behavior to the requirements of the law was impaired?

A When?

Q When you interviewed him?

A No. I think that the defendant was aware of his actions during the time that I interviewed him.

I think he was competent in the way he responded to me. I did not feel that he was in any way disorganized

at that time.

Q And you, of course, noted that he knows right from wrong. Is that correct?

A Yes.

Q Could you tell us how a person who exhibited these symptoms that the defendant has exhibited would react to a stress situation.

A Well, I find my experience with this population is that unless they are on medication, I find them to be very fragile, even when on medication.

It doesn't take very much stress to get them decompensated, meaning to get them acting bizarre and irrational.

I find Mr. Breedlove a person who is emotionally unstable, and I do not believe that under stress conditions, he can stand up very well. He would be unable to cope with it, given my understanding of where he is at.

Q When you interviewed the defendant, did he exhibit what is known as a "Flat effect"?

A Yes.

Q Would you explain to the jury what you mean by that.

A Well, you try to see what the person is like. You look at him, observe his movements; observe his eye contact; his manner of speech; how does he talk and relate to you;

does he look at you; is he afraid of coming closer; if you lean forward, does he move away from you.

The feeling I got from Mr. Breedlove is of feelings of distance, somewhat. A person who just related his feelings in a monotonous, kind of a flat, straight-kind of effect. In other words, there was no change, that I could observe. While I was relating to him, he was basically a blah. You know, all along, even though the things we discussed were different, yet his responses emotionally had the same kind of quality.

MR. LEVINE: No further questions.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. STELZER:

Q Doctor, in response to one of Mr. Levine's questions, you said, "That is not within my area of expertise. I am not a doctor." Is that correct?

A No, no. I said, "I am not a physician and I do not prescribe the medication."

Q You never went to medical school?

A True.

Q You are not a doctor of medicine.

A True.

Q You are not a licensed or board certified psychiatrist, are you?

A No. I am a licensed psychologist.

Q All right. Dr. Center, who has just testified, are you acquainted with him?

A Yes.

Q He too is a psychologist and not a psychiatrist, correct?

MR. LEVINE: Objection as beyond the scope of what he knows.

THE COURT: If you know.

A [No response]

Q [By Mr. Stelzer] You have to answer out loud so he can write down "yes" or "no".

A Would you repeat the question.

Q Dr. Center is not a psychiatrist.

A True.

Q He did not go to medical school either.

A True.

Q He cannot prescribe any medicines either.

A True.

Q Are you acquainted with Charles Mutter and Albert Jaslow?

A With Mutter, yes; Jaslow, no.

Q Dr. Mutter is a psychiatrist, is he not?

A Yes, sir.

Q He did go to medical school.

A Yes.

Q He can prescribe medicines.

A Correct.

Q He is well known as being an expert. He has testified many, many times in the courts and the criminal courts of Dade County.

A To my knowledge, yes.

Q How many times have you testified as an expert in these courts in this building?

A This is the first time.

Q You have never previously testified as an expert in this building?

A No.

Q You made some mention about having some knowledge of Mr. Breedlove's activities in California. Is that correct?

A Yes.

Q Did you ever examine any of the police reports from the incidents in California that the defendant was involved in?

A I asked for from the public defender's office to send me all information on Mr. Breedlove. I have not received that kind of information.

Q You mean Mr. Levine and Mr. Zenobi did not provide you with the information about these California incidents?

MR. LEVINE: I will object.

We have not been provided with the police reports, and he deliberately refused, and we had a pre-trial hearing on this, Judge. This was denied us.

MR. STELZER: Most respectfully, that is untrue.

THE COURT: Go ahead.

Q [By Mr. Stelzer] Is it not a fact that you have never looked at any of the reports of what Mr. Breedlove did in California?

A True.

Q You do not know then that he has been convicted of two counts of assault with intent to commit rape and a burglary with assault on somebody inside, do you?

A No.

Q You do not know any of the results of any of the tests that were administered to him at the time he committed these crimes in California, do you?

A True.

Q You do not know then that he was sentenced to one to twenty years and five to life for those different crimes he committed?

A No.

Q You do not know then that he absolutely was not declared insane or impaired back in California.

A True.

Q Did you look at any of the police reports in this case, the reports of the Dade County Public Safety Department Homicide Section?

A No.

Q Did you look at any of the statements, sworn statements, of witnesses in this case, who observed the defendant's behavior around the time he committed this crime?

A No.

Q Did you look at the confession or statement that the defendant gave in this case to see what type of mental attitude he may have had when he committed this murder?

A No.

Q Were you aware of the fact that in order to keep himself from being caught, the defendant stated that he wore socks on his hands to keep from leaving fingerprints in this case?

A No.

Q Were you aware that in an effort to conceal himself and escape this crime, he stole a bicycle from a twelve year old child and rode it off after he committed the murder?

A No.

Q Were you aware that in order to keep the police from finding any blood on his clothing, immediately after the

murder he took a razor blade and hacked off his pants and threw the remainder of his pants in a Dempsey Dumpster to get rid of them?

A No.

MR. LEVINE: Objection as irrelevant for the purposes of what this witness is offered for.

He is testifying as to the results of psychological tests. The State Attorney knows that is his field of expertise.

THE COURT: Overruled.

Q [By Mr. Stelzer] Were you aware that in order to escape detection, he took one of the watches or both of the watches he stole in this case and sold them to a junkie or dope fiend, as he refers to them, up in Hallandale or Hollywood, Florida?

A No.

Q Are you aware that when approached by the police some three days after committing this murder, the defendant further attempted to conceal his involvement in this crime by giving the police a phoney name?

A No.

Q Don't these things become at least somewhat relevant to you in assessing the defendant's mental makeup at the time of the crime?

A Yes and no. Let me answer both questions.

Q All right.

A Yes, in terms of helping me to understand the kind of behaviors that Mr. Breedlove is capable of.

Secondly, I think to some degree, I have not been biased by this kind of a background.

My information was seen from a non-biased standard. In other words, a pre-conceived notion of what this person was all about. I was looking at what I got, and what I got was based on my clinical understanding and impression of Mr. Breedlove, and on his actual behaviors, what they manifested to me through firsthand experience and me evaluating him.

I am not questioning whether your data is correct or wrong, but the only thing I can say is what my impressions were at the time I had examined him, and I honestly believe that my evaluation of him is based on what I saw during our sessions.

Q Certainly in order to assess his behavior at the time this happened, you would have wanted to see as many accounts as possible of his behavior at the time he did this, would you not?

A Given I did not have this kind of information, I had to go on what I have. What I have is a human being who is in front of me, and I have been hired by the public defender's office to examine him and to give my expert

opinion.

Q You were hired by the public defender's office to come in here today, and that is Mr. Zenobi and Mr. Levine.

A Yes.

Q They were the ones that did not provide you with these documents that may have assisted you in forming your opinion. Is that right, sir?

A It looks that way.

Q Would it be fair to say that the defendant is a sociopath, with simply an anti-social personality?

A I would not accept that diagnosis of him.

Based on, again, my evaluation of him and based on my clinical observation and feelings about the case, I do not believe Mr. Breedlove is a sociopath. I think he is suffering from an organic deficiency, as well as a paranoid schizophrenic condition.

Q Did you draw that opinion, Doctor, from his sketch of the house, his sketch of the tree, or his sketch of the stick figure?

A All of the above, as well as from his performance on the rest of the tests.

None of my impressions were based on a single drawing or a single test. They come from samples that I have drawn through these tests of his behavior and looking at his test profile, and I made that assessment of him.

Q It is your testimony that you can develop, at least a preliminary psychological and personality perception of anyone on this jury based on the way they draw a picture of a house, a tree, and a person?

MR. LEVINE: Objection.

THE COURT: I am sorry, Counsel.

MR. STELZER: The question was, "Can you develop a personality profile of anyone, including someone on this jury, based on a drawing of a house, a tree, or a person."

MR. LEVINE: Objection as to referring to any members of the jury.

THE COURT: Talking about anybody.

Q [By Mr. Stelzer] Forgetting about the jury, it is your testimony that you can get a basic psychological diagnosis from anybody, from the way a person draws a house, a tree, or the figure of a person?

A Not by itself. I would be getting out of the test some impressions. I would not be willing to say I would be able to have a definite position on their personality based on that test.

Only I would have to have other instruments to assess them.

Q You made mention of having examined several youngsters. I believe that was your word. The defendant is

not a youngster, is he?

A He is a human. All humans show the same common denominators of behaving, feeling and thinking.

Q My question was, is this man a youngster?

A I gave the way I felt. He possessed young traits. He is not a youngster.

Q He is 31.

Q That does not make him an adult psychologically.

Q You testified, Doctor, that you found neurological impairment. Is that correct?

A [No response]

THE COURT: Answer out loud.

A Yes, sir. I am sorry. I think I am in therapy.

Q [By Mr. Stelzer] You are not a medical doctor--

A No, I'm not.

Q --specializing in neurology.

A True.

Q In order to determine the actual existence of any neurological impairment, should such impairment exist, that opinion would have to be given by a neurological specialist who is a doctor, a physician, correct?

A Very true. I made that recommendation in my report.

Q You recommended to Mr. Zenobi and Mr. Levine that they should seek a neurological study of the defendant?

A True.

Q Do you have any indication that they went ahead and got a neurological study done of this defendant?

A No.

Q Did the defendant ever tell you that anybody forced him to take any illegal drugs?

A No.

Q I believe your report says that Mr. Breedlove's overall behavior during the testing sessions was adequate. Is that true?

A [No response]

THE COURT: That is a "yes"?

THE WITNESS: Yes.

Q [By Mr. Stelzer] And you indicated he responded well to the tasks at hand.

A Yes.

Q And he was oriented in terms of place and persons.

A Yes.

Q He has difficulty in conversation and he has distractability?

A Yes.

Q You also note that he has difficulty in visual acuity and visual motor coordination. Is that right?

A Yes.

Q Would your opinion on that change if you knew that

on November 6, 1978, in a pitch black room, he was able to take this butcher knife and plunge it into the chest of a man, missing his heart by only an inch and a half or so? Would it change your opinion as to his visual acuity or motor coordination?

A No.

Q That is the ability to see and move simultaneously.

A True, but may I respond to that?

Q Go ahead.

A What I was measuring was his ability to have fine eye-hand motor coordination. In other words, the assessment I was having of him was to try to find out whether or not this person was suffering from any kind of a brain deficiency.

What you have just described is not a fine kind of eye-hand motor coordination.

Q It is not?

A No.

Q You said that the defendant prefers not to get involved with other people in his environment.

A True.

Q Were you aware of the fact that the defendant was living at home with his mother, brothers, and sisters?

A Yeah. The fact that a person is living with the mother, brother and sister does not mean he was feeling

comfortable and getting involved. Getting involved does not mean physical proximity.

I am talking about the emotional involvement that this person has. We are familiar that people can live with one another for many years and are not involved with one another.

Q I believe you testified that the defendant fully understood his Miranda rights given to him.

A True.

Q He fully understood the difference between right and wrong.

A True.

Q Therefore, had he been willing to admit a role in the murder, it was your opinion that he would have known darn well that murder was against the law and---

A Well, from what Mr. Breedlove told me, he said he had been coerced into signing the confession. I was trying to understand what he meant by that, and he told me that for several times he has been taken from his cell and he had been beaten up, and he has been told he is going to get killed or they are going to kill him if he does not sign on the papers.

According to him, he has been beaten and he has been threatened again and again. In fact, he further suggested to me that the police have called his mother in,

and they offered her some liquor or some alcohol in order for her to persuade him to confess to the murder.

Q He told you they brought his mother in and gave her booze in the police station to get her to persuade him to confess?

A No, but several times he said they offered her alcohol to say something bad about him.

MR. STELZER: May we have a side bar at this time?

[Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the Court outside the presence of the jury and the following proceedings were had:]

MR. STELZER: Apparently this doctor is basing his opinion to a large extent on what Mr. Breedlove told him about coercion by the police.

I would like to ask him if he is aware of the fact that Mr. Breedlove confessed to other crimes, as to whether that would affect his opinion as to his mental condition and whether or not he could evaluate Mr. Breedlove's truthfulness as to coercion. Would it have an affect on his truthfulness if he knew that the defendant confessed to---

THE COURT: I think the probative value of the answers to those questions would not be significant when weighed against the prejudicial affect they might

have and I sustain the objection to them.

[Thereupon, the following proceedings were had within the hearing of the jury:]

Q [By Mr. Stelzer] Doctor, you stated, I believe, that the defendant is impaired not only in his mental condition, but in his ability to handle stress. He does not have a good ability to handle stress. Is that correct?

A Well, good ability is a very loaded term. What I really mean is--- You see, part of my understanding of intelligent behavior is where the person is able to perceive the essential elements of the environment or the situation and be able to respond appropriately to the situation.

Q I did not mean to put words in your mouth.

Could you tell us once again what your opinion was as to his ability to handle stress.

A I am saying that I think my understanding of Breedlove is that he does not possess the ability to use good judgment under stress.

In other words, when he has been pushed or he has been threatened or he has been coerced to do certain things, because of his emotions, he will lose all form of any kind of judgment and he won't make the right decisions.

Q How would that manifest itself physically? Would he be nervous and fidget? Would he glance from side to side?

BERT FRIEDMAN TOM LOMBARDI

A He might do that, or he might act in a strange fashion.

Q Would you consider a trial with the possibility of capital punishment a stressful situation?

A True.

Q If you were to know that during the course of this murder trial, the defendant exhibited absolutely none of these symptoms you just talked about, would that affect your opinion as to whether or not he can or cannot handle a stressful situation?

A No. The reason I say "No" is the conditions that he is exhibiting now are not now his quote normal condition close quote. He is under medication at this time. He is being tried for his life, and I do not believe I would expect him to exhibit these kinds of behaviors.

As a matter of fact, I would expect him to be somewhat depressed and melancholy, feeling sad and pretty unhappy.

Q The defendant's statement to you about this murder is that he does not have any recollection of it at all?

A True.

Q Since he does not have any recollection, he certainly has not shown the slightest bit of remorse, has he?

A No, he has not.

Q Thank you, sir.

BERT FRIEDMAN TOM LOMBARDI

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. LEVINE:

Q Would anything that you could be told about the surrounding circumstances of this case make any difference at all as to the results of the test you administered?

A No.

MR. LEVINE: No further questions.

THE COURT: Thank you, sir.

You are excused.

[Witness excused]

THE COURT: Ask your next witness to come in, please.

MR. LEVINE: The defense will call Dr. Lloyd Miller.

Thereupon:

LLOYD R. MILLER

was called as a witness on behalf of the Defendant and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEVINE:

Q Would you state your name and occupation, please.

A Yes. My name is Lloyd Richard Miller. I am a physician. I practice in Dade County. I am a psychiatrist.

Q Doctor, would you tell the jury what your training is.

A Yes, sir. I was graduated from the University of Tennessee College of Medicine in 1971.

MR. STELZER: I know Dr. Miller personally. I will stipulate to his expertise.

MR. LEVINE: We will accept the stipulation.

Q [By Mr. Levine] You are a medical doctor, though. Is that correct?

A That is right.

Q Doctor, did you have occasion to examine a McArthur Breedlove?

A Yes, I did. I examined him on two different occasions.

Q Did you see him before?

A Yes.

Q I am sorry to interrupt you.

A Yes. I examined him on February 7th and February 12th of this year, approximately one hour each time in the Dade County Jail.

Q Did you go into his past psychological history with Mr. Breedlove?

A Yes. I went into his past medical, surgical, and psychiatric history.

Q When you saw Mr. Breedlove, was he on any medication?

A Yes. He was on medications.

Q What medication was he on?

A He was prescribed Trilafon, which is an antipsychotic medication, on January 24, 1979.

According to the medical records of the Dade County Jail, his other medication had been discontinued on that date. In other words, his medications were changed; so, in February, he was on this medicine approximately two weeks, three weeks.

Q What is the purpose of that medication?

A It is an antipsychotic medication. We call this a major tranquilizer. It's used for the treatment of conditions such as schizophrenia.

Q What would a side effect of that drug be?

A The side effects would include drying of the mouth, constipation, a general drying effect, irritation, and also tremors of the hands and possible involuntary movements of the eyes or tongue.

Q Would the defendant's affect be flat and unemotional because of these medications?

A Not necessarily. The person's affect would be more likely to be flat as a result of, basically a mental illenss.

The improvements that the medications might provide would render the person with more affect. This is

discounting the possibility of over-medication.

Q What was the defendant's affect when you examined him? That is a-f-f-e-c-t.

A He had a sad expression on his face, according to me, in my report, and he was blunted. When I say "blunted," I usually refer to a depressive aspect, rather than the flat one usually seen with schizophrenia.

Q What medication did you become aware of that the defendant took in the jail?

A Sinequon, an antidepressant medication with sedative effects, which was given to him at bedtime. He was prescribed the medicine on December 8, 1978, by the jail psychiatrist. The dose was in the medium range for depression.

Q Any other medications?

A He was given other medications, which are used for the side effects of these major tranquilizers he was prescribed in the jail. They don't have any specific psychiatric treatment qualities, in that they don't change the person's basic mental processes. They are simply for the side effects of the other medicines.

Q Doctor, in arriving at your conclusions in this case, what was the course of your interview? What did you do?

A I saw him on two different occasions. As I told

you, the first occasion I wanted to get into his past medical background, legal involvements, general growing up, childhood growth and development, things like this--how far did he go in school, generally an overall view of his life up to this date.

On the second occasion, I performed a mental status examination of him and tried to ascertain, as best I could, what his mental condition was at that period of time. In other words, 1979.

Q Did you arrive at an opinion, to a reasonable medical and psychiatric certainty?

A Yes, sir. It was my opinion that he suffered from chronic paranoid schizophrenia.

His mental condition, apparently was of some long standing, and that it had been improved with the medications that he was taking in the jail.

Q Doctor, would you explain to the jury what a paranoid schizophrenic is.

A Well, I'll try to. The diagnosis of paranoid schizophrenia is simply a label we put on people, that is to be differentiated from a basic character structure, which is also important. A person can be raised in two different ways and still be diagnosed as a paranoid schizophrenic in their adult years; so, it is a little difficult to tease out the personality from the specific psychiatric illness.

Basically a paranoid schizophrenic is a person with difficulty in interpersonal relationships.

The person's general mode of dealing with the world at large is one of mistrust of others and some isolation.

The person may suffer from auditory hallucinations; that is, hearing voices or delusions; false beliefs. With their illness, they may have false beliefs that persons are persecuting them or they have some understanding with God or they may identify with the president of the United States in a positive sense or in a negative sense. People like this may wish to harm someone like an authority figure.

Q Doctor, the defendant knows right from wrong, does he not?

A At the time of my examination, yes, sir.

Q Considering everything that you know about the defendant, taking into consideration all of the interviews from the time that you spent with him, do you have an opinion, to a reasonable psychiatric and medical certainty, as to whether or not the defendant suffers from an extreme mental or emotional disturbance?

MR. STELZER: That is not the test. The test is, was he suffering from it at the time.

THE COURT: Sustained.

Q [By Mr. Levine] Is a paranoid schizophrenic

suffering from an extreme mental or emotional disturbance?

MR. STELZER: Objection.

He has not specified as to when.

THE COURT: Overruled.

He is asking a general question as to whether or not a person with this is.

You may answer.

A Yes. I'll try. I think a person with a diagnosis of schizophrenia would suffer from an extreme mental condition, yes.

Q [By Mr. Levine] Is there anything that you noted in your examination to suggest that this schizophrenia was a recent development?

A No.

Q Were you able to arrive at an opinion, to within a reasonable psychiatric and medical certainty, as to whether or not the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired or not?

A At what period of time?

Q At the time you saw him.

MR. STELZER: Objection; not relevant.

THE COURT: It relates to November of 1978.

MR. LEVINE: I think I can tie it up, if the doctor is permitted to answer.

THE COURT: You may.

A At the time I saw him, I believe he was more capable of adhering to the requirements of the law. This was in February of 1979.

Q Why is that?

A Primarily because of his antipsychotic medications.

Q Let me ask you a hypothet: If someone is suffering from a condition you noted the defendant to be suffering from, and was removed from psychotropic medication, what would be the result?

A One would expect that within a period of one to two months, an exacerbation, that is, a new phase of psychotic symptomatology. This person would amount to being more sick.

Q Doctor, assuming the hypothet that the person was not on psychotropic medication at the time of this incident, what would his mental status have been at that time?

A If he were not on this medication for several months, it's more likely than not he would be capable or potentially psychotic.

The fact that he was not means that what it would take to get him there would not be very great.

Q Assuming such a person as the defendant was not

taking medication or had not received any medication, how would he react to a stressful situation?

A One would expect a paranoid response; that is, mistrust and potential hostility.

Q What would you say the prognosis in the defendant's condition would be if he were continually taking psychotropic medication and receiving psychiatric treatment in prison?

A It would be good.

MR. LEVINE: No further questions.

CROSS EXAMINATION

BY MR. STELZER:

Q Hello , Dr. Miller. How are you today?

A Good afternoon.

Q Do you remember speaking to me on the telephone about this case within the last two weeks?

A I believe a week ago Friday.

Q Do you remember a week ago Friday I told you if there was any report, any document, any piece of the defendant's background, anything whatsoever that I or the State Attorney's office could do to assist you in reaching an opinion in this case, that you should not hesitate to call us and we would provide you with every piece of documentation that either Mr. Zenobi or Mr. Levine did not provide you with?

A I remember.

Q Did Mr. Levine or Mr. Zenobi ever provide you with any of the police reports in this case?

A I don't believe so.

Q Did they ever provide you with any of the statements of any of the witnesses in this case?

A No, they didn't.

Q Did they ever provide you with a copy of the defendant's confession in this case?

A No.

Q Did they provide you with copies of the documents relating to the defendant's past convictions in California?

A No.

Q Did they give you any psychiatric reports from when the defendant was examined, after being convicted of two counts of assault with intent to commit rape and burglary with assault?

A No.

Q Dr. Miller, you never called me and asked me if I could provide those things, did you?

A No, sir. May I explain why not?

Q You sure can.

A I went to my office either Saturday or Sunday this past weekend and got a subpoena on this case.

I had not anticipated testifying, and so I received the subpoena just through the mail under the door. The next working day is this morning. I am sitting around the house waiting. I had no idea I would be called today to come to court. I got a call at ten o'clock this morning.

Q So this is just a last minute thing. Mr. Zenobi and Mr. Levine asked you to come into court at the very last minute?

MR. LEVINE: Objection.

THE COURT: Sustained.

Q [By Mr. Stelzer] You found a subpoena asking you to appear in court---

MR. LEVINE: Objection; repetitious.

THE COURT: Let's get on with it.

Q [By Mr. Stelzer] Would you have liked to have had an opportunity to be provided those documents Mr. Godwin and I offered to let you see, to assist you in reaching an opinion?

A Any material that is pertinent would be useful to look at.

Q Were you aware of the fact that the defendant wore socks on his hands to keep from leaving fingerprints in this case?

A No.

Q Were you aware that in order to escape from the

house, he stole a bicycle from a few houses down?

A This is the only part of the case I had contact with him. He said he was arrested for stealing a bicycle.

Q The defendant denied any other involvement in the offense and said he was arrested for stealing a bicycle?

A You are quoting from my report?

Q Yes.

A Yes. Then I totally said that.

Q Did you know that the defendant had cut off the bloody section of his pants and thrown the remainder in a dempsey dumpster so that the police could not get it?

A No, sir.

Q Do you know he had given a phoney name to the police a couple of days later?

A No.

Q Do you know he took the jewelry he stole from the house of the victim in this case and pawned it to a junkie up in Hollywood?

A I didn't know that.

Q This is stuff that would be valuable to you in assisting you in making a diagnosis, would it not?

A It would be valuable in assisting me in rendering an opinion as to his mental condition at the time he was charged with those activities.

Q Going back to your report for a minute, on the

bottom of page two, I see the paragraph here that says, "He"--meaning the defendant--"is diagnosed as suffering from paranoid schizophrenia. Another diagnosis of the defendant has been narcolepsy."

A Yes.

Q Whose past diagnoses were these if you did not receive any past reports? Who diagnosed him as these things?

A I don't know who diagnosed him as these things. You know, this is material that I reviewed in the Dade County Jail medical records.

Q Is it possible that that material about past diagnoses for schizophrenia and narcolepsy were based solely on the defendant's statement that he had been diagnosed in the past as schizophrenic or was suffering from narcolepsy?

A I don't know where it came from. It's possible it was from the defendant or some other source I am not aware of.

Q Assume that material came from the defendant, that he had been previously diagnosed as a schizophrenic. Assume that the defendant was not telling the truth, and assume further that instead of being diagnosed as a schizophrenic, the defendant has been diagnosed, in 1969, in California, as an antisocial personality with sexual deviation, and he had thinly veiled hostilities, and he

was given the diagnosis of an antisocial personality with severe sexual deviation with an attempted rape, and that he was a disoriented sex offender, not amenable to hospital treatment. Assume those were really the diagnoses that he had had in the past, and not the one the defendant said he had, which was paranoid schizophrenia.

MR. LEVINE: Objection.

THE COURT: Overruled.

Q [By Mr. Stelzer] If he said it, would that assist you in rendering an opinion about this person?

A That would reduce the materials that would favor diagnosing paranoid schizophrenia in him.

MR. STELZER: Mark this, please.

[Thereupon, the item referred to was marked as State's Exhibit 1-A for identification.]

Q [By Mr. Stelzer] Let me show you what has been marked as State's Exhibit 1-A for identification. I ask you if you have ever seen that document before.

A No, I haven't.

MR. LEVINE: Objection.

I would like a side bar.

THE COURT: What is the objection?

MR. LEVINE: We have received no reports of any experts.

THE COURT: Go ahead.

Q [By Mr. Stelzer] Assuming that document was a pshchological evaluation of the defendant, and if you would take a brief glance at it and assume that to be true, and assume that document reaches a diagnosis that the defendant was an antisocial personality with severe sexual deviation, would that be the type of document, the type of psychological report, that would assist you or might assist you in formulating an opinion in this case?

MR. LEVINE: Renew the objection.

THE COURT: Sustain the objection, Counsel.

Q [By Mr. Stelzer] Doctor, insofar as your opinion in this case is concerned, you stated that the prognosis for the defendant's improvement is a good prognosis.

A The prognosis of his schizophrenia.

Q Assuming, as your report states, that he had been diagnosed as a schizophrenic prior to 1969 in California and that during his two to two and a half years in the California State Penitentiary, he had received a great deal of treatment for this alleged schizophrenia, and assume further that after that treatment he had been paroled and had come to Dade County and had murdered somebody during a burglary--

MR. LEVINE: Objection.

Q --would that change your opinion as to whether his prognosis for improvement is good?

THE COURT: Sustain the objection, based upon the facts not being in evidence.

Q [By Mr. Stelzer] You said that if the defendant was removed from medication, he would, in all likelihood, become psychotic again.

A It's a possibility, yes. It would have to be after the medicine wore off, but it would be within a few months.

Q I think you said he was capable or potentially psychotic. Is that correct?

A Sure.

Q Which means if he were no longer taking the medication prescribed for him, he might revert back to the very same behavior he exhibits without any medication at all, correct?

A This is possible.

Q Do you know of any way, in either an outpatient or inpatient facility, of forcing medication down the throat and into the blood stream of somebody such as the defendant?

A One method that I would suggest is intramuscular medication, Prolixin, which could be given every two to four weeks, which can be given to an individual on a relatively involuntary basis, where they do not have to take it by mouth and the reliability is checked.

Q You are talking about something he has no choice over. You are talking about an injection that somebody gives him whether he likes it or not.

A Yes.

Q In your report, don't you state that you think the defendant could benefit from placement in a halfway house with supervision of his daily activities, and that the defendant should attend follow-up psychiatric outpatient appointments. First, yes or no.

A Yes.

Q Was that your recommendation?

A Certainly.

Q My next question is, how, if he is going to be on a voluntary outpatient basis, which is what you recommend for this man--- By the way, do you know now that he has been convicted of first degree murder?

A I learned that today.

Q Are you still recommending that although he has been convicted of first degree murder, he be allowed to receive outpatient psychiatric treatment?

MR. LEVINE: Objection.

The State Attorney knows there is a 25 year minimum involved.

THE COURT: Overruled.

He is asking an opinion. He may answer.

A Could you repeat the question?

Q [By Mr. Stelzer] Now that you know that he has been convicted of first degree murder, is it still your opinion that what should be done with this defendant is that he should receive placement in a halfway house with supervision of his daily activities, and he should attend follow-up psychiatric outpatient appointments and take his medications as prescribed?

A Could I give you a two-part answer?

Q You can give me a ten-part answer if you like.

A Two is fine. No. I don't believe he should be placed in a halfway house as a disposition of this case.

Secondly, outpatient psychiatric treatment would be non-hospitalized treatment. I would continue to recommend psychiatric treatment, if he were in a correctional facility. This, I would consider to be outpatient, in that it is not a psychiatric hospital that he was being housed in.

Q Doctor, I think that the bottom line here, as I told you on the phone, is whether or not you can state an opinion in this court, within a reasonable medical certainty, about the condition of this defendant at the time the crime was committed, and that opinion deals with whether he was under extreme mental or emotional disturbance and whether his capacity to conform his conduct to the requirements

of the law was substantially impaired. Are you with me?

A I am with you.

Q Is it not true that you absolutely cannot render an opinion, within reasonable medical certainty, regarding the defendant's sanity at the time of the alleged offenses?

MR. LEVINE: Objection.

That is not the question you just asked him.

THE COURT: Can you answer the question that has been posed to you?

THE WITNESS: He is restating material from my report, Your Honor.

Q [By Mr. Stelzer] Is it not true that your report reads verbatim, "I cannot render an opinion, within a reasonable medical certainty, regarding the defendant's sanity at the time of the alleged offenses. The defendant's inability to remember the events for which he was arrested makes it impossible for me to determine his mental condition for that period of time."

MR. LEVINE: I renew my objection.

Sanity is not an issue.

THE COURT: Overruled.

Q [By Mr. Stelzer] Is that what you said in your report?

A That's what I said and in my report.

Q Is your report true and accurate?

A Yes. May I mention something?

Q Go ahead and explain.

A In the second statement, I was talking about I cannot render an opinion regarding his mental condition--I was still referring to with respect to the legal criteria of McNaughton, sanity, which is really a restatement of the first sentence; however, I would add that if he could not tell me what he was doing for that period of time, it is still fair to say that I would have some difficulty saying what his mental condition was like.

Q You are saying here in court that you would have some difficulty in determining what his mental condition was like, but your report reads, "That the defendant's inability to remember the events for which he was arrested makes it impossible for me to determine his mental condition for that period of time."

Is it not true, as you wrote in your report, that it is impossible for you to determine the defendant's mental condition at the time he did this crime?

A That is what I said. It is not a mental diagnosis. Perhaps I could make some inferences from past or present, but as far as his mental condition--was he hallucinating, psychotic, stone-cold sober--this, I could not say.

Q Was he substantially impaired, under extreme disturbance?

A Well, I answered with respect to the hypotheticals about no medications. That is the best I can do. It is all hypothetical with respect to my opinions, but within reasonable medical certainty, it is impossible for me to tell the defendant's mental condition at the time of the offense with respect to extreme disturbance or substantial impairment, given no further materials, as I said in the next sentence.

Q Thank you.

REDIRECT EXAMINATION

BY MR. LEVINE:

Q In your report, you said it is impossible to determine his mental condition. Are you referring to the McNaughton test, right from wrong?

A That's correct.

Q Doctor, assuming the hypothet that this man was not under medication at the time of this incident, is it still your opinion that he was suffering from an extreme mental disturbance at the time?

A Well, my opinion that he has an extreme mental disturbance is based upon my examination of him, and believing him to suffer from paranoid schizophrenia. Treated or untreated, in his best mental condition or on no medications, it is a rather extreme situation.

Q What do you mean by an "extreme situation"? Do

you mean an extreme mental disturbance?

A Yes.

MR. LEVINE: No further questions.

A At his best, he is not well. At his worst, he is worse.

Q Thank you, Doctor.

THE COURT: We are going to take until four o'clock to give our court reporter a chance to rest his fingers.

I would like to have copies of those matters we would like to discuss.

Be ready to get started at four. Please do not discuss it now.

[Thereupon, a recess was taken, after which the following proceedings were had outside the presence of the jury:]

MR. STELZER: I still have not gotten my packet back. All right. I got them.

THE COURT: I have a couple that I give. That really does not do any good, Mr. Levine, to rephrase the circumstances. I deny one and two because I give it. Three and four, that is covered in the charge. Five is covered in the charge, six. I think all of these are denied because I give them in the standard that I have. "The aggravating circumstances which you may

consider are limited to those upon which I have instructed you." In other words, the two specials that you have are ones I give as a standard.

MR. LEVINE: Which ones?

THE COURT: I said them.

MR. LEVINE: Those were alternative instructions. Should you deny one, you could give the other.

THE COURT: All I am saying is, here is one I give, where it says, "The aggravating circumstances, you are limited to those upon which I have instructed you," and two, the one about two or more aggravating circumstances referring to the same aspect of the crime, you should consider as only one aggravating circumstance, and then the additional one which says, "You are not limited to the number of mitigating," which is your number eleven.

MR. LEVINE: You are denying that, but giving a similar one?

THE COURT: I am going to give it in almost identical words.

MR. STELZER: What happened to six, seven, eight, nine and ten?

THE COURT: I denied them.

Does that make sense to you?

MR. STELZER: Are you giving eleven and twelve?

THE COURT: No. I am giving eleven and giving thirteen, only I already have it.

MR. STELZER: How do you have this phrased?

THE COURT: When two or more aggravating circumstances refer to the same aspect of the crime, you consider them as only one aggravating circumstance.

The other one is, "The aggravating circumstances you may consider are limited to those I have instructed you on, however, there is no limitation to the mitigating circumstances which you may consider."

MR. LEVINE: Let me withdraw number fourteen. Fourteen is withdrawn--talking about no prior significant history. That was placed in there by mistake.

THE COURT: And your number eleven is also covered by the one that I give as a standard, so I am covering the two you wanted, but in my own phraseology.

All of the others I have been through and denied.

MR. LEVINE: Specifically number fifteen, I do not know what your copy says, but there was a change in my copy that did not print out on the Xerox. Number fifteen should read, "Stipulation by the State that the defendant never intended to kill the victim is a mitigating circumstance. You must consider it as such." You denied that?

THE COURT: I denied that.

MR. LEVINE: Do you deny sixteen, Judge?

THE COURT: Yes.

What may I ask you is the time limit you would like to argue these issues?

MR. STELZER: I would like thirty minutes.

MR. LEVINE: I think thirty minutes should be adequate, but I do not want to feel I am limited.

THE COURT: It is going to be the State and the defense.

We are not going to get involved in the prejudicial aspects that you brought up concerning the use or the means of death, and the opposite aspect, the difficulty of death and so---

MR. STELZER: I have no intention whatsoever of saying that it is a painless way to go, and I take it you are instructing Mr. Levine not to talk about flesh burning, eyes popping.

THE COURT: Yes.

MR. LEVINE: I want it clear that that is the directive of the Court. I intended to go into the ritual leading up to the execution, as well as the manner of execution.

Is the Court ordering me specifically not to do that?

THE COURT: I do not think that is an appropriate

matter. We instructed them on prejudice and sympathy. The obvious basis---

MR. LEVINE: For the record, you are ordering me not to go into that?

THE COURT: I have not heard a motion to limit it. You are the one that raised the earlier issue about it, which brought it to my mind. I take the position that it is not an appropriate argument to give to a jury. It is obviously based on sympathy; the same as the State's might be based on prejudice that it does not hurt.

I would like to try this case on mitigating circumstances, and aggravating circumstances, and the evidence they have already heard, plus the law I have charged them on.

Thirty minutes a side is fine. It will be the State and the defense and the State has two more witnesses to do on rebuttal.

MR. LEVINE: I feel I have to try to pin you down so as not to be in contempt of your wishes. Absent a direct order of the Court, I intend to go into that.

THE COURT: You can call whatever order of the Court you want. I just got done saying it. I think it is quite clear. I do not think the argument about what you call the prologue or something to the death penalty,

the marching and all of that routine, is an appropriate argument for the jury in the penalty phase of the case, and I would hope you would not get involved in that.

I cannot be any more explicit to you than I am.

MR. LEVINE: I do not mean to be disrespectful. I think you could instruct me---

THE COURT: I do not know what your argument is. I have not heard your argument. I have heard some I found to be capable of presentation to a jury.

MR. LEVINE: Now I understand.

THE COURT: I have heard some that are not. What I am suggesting to you is, I hope yours is not one that is not.

You are trying to reach over the brink. How far you can go, I cannot tell you that.

MR. LEVINE: You are not in a position to rule now, not having heard the argument.

Of course, if an objection is made and it is sustained, of course I will not continue.

I will try to do it within the bounds of what the Court will permit.

THE COURT: You know, you may open something on your part which might call for some rebuttal argument for the State.

MR. LEVINE: It is our position that the State does

not have any rebuttal in these arguments.

THE COURT: It may not. I feel the same way. That is why I am trying to be sure we do not have any problem. All right.

You are staring at me, Mr. Zenobi. Is there something you need?

MR. ZENOBI: It is called exhaustion, sir.

THE COURT: Then sit down and relax.

I do not know whether I offended you or something which caused you to stand with your hand like that staring at me.

Bring them in and go ahead.

[Thereupon, the jury entered the courtroom after which the following proceedings were had:]

THE COURT: Call your next witness.

MR. GODWIN: Call Dr. Jaslow, Your Honor.

MR. LEVINE: For the record, we will rest.

THE COURT: All right, sir. Thank you.

Right up here, please.

Thereupon:

ALBERT C. JASLOW

was called as a witness on behalf of the Plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GODWIN:

Q Doctor, please state your name and spell your last name for the court reporter and tell the members of the jury what your occupation is.

A Albert C. Jaslow. J-a-s-l-o-w. Physician, specializing in the practice of psychiatry.

Q How long have you been a physician specializing in the field of psychiatry?

A I have been a physician since 1950. I have been practicing psychiatry here since 1954.

Q What training and background do you hold for the position of psychiatry?

A I had my M.D. degree from Wayne State University College of Medicine. I did my internship at Jackson Memorial Hospital.

My first year of residency was at St. Elizabeth's Hospital in Washington, D.C.

I finished up in the neuropsychiatric institute at the University of Michigan. I came back here in '54 and have been practicing psychiatry ever since.

Q Have you had occasion to testify in the field of forensic psychiatry in the courts of the State of Florida?

A Yes. In all the courts here.

Q Approximately how many times?

A Hundreds.

Q Have you been recognized as an expert by His Honor, Judge Fuller, in the past?

MR. GODWIN: I will tender the witness as an expert.

THE COURT: He will be received as such, of course subject to cross examination and the jury's evaluation.

Q [By Mr. Godwin] Doctor, did you have occasion to examine one McArthur Breedlove?

A Yes. I saw him here at the county jail.

Q Do you recall what day that was that you saw him?

A February 21 of this year.

Q Do you recall the circumstances that caused you to examine Mr. Breedlove?

A Yes. I was requested by court order to examine him for purposes of determining his competency at the time of the examination; also, to give an opinion as to his competency, sanity, at the time of the commission of these alleged offenses.

Q You were not hired by the public defender's office. Is that true?

A That's true.

Q You were not hired by the State Attorney's office. Is that true?

A It was as a result of the court order signed by the judge on the 16th of February of this year.

Q So you were appointed by the court and no one else. Is that correct?

A Yes.

Q Would you tell the members of the jury what your findings were, based upon your evaluation of Mr. McArthur Breedlove on the day that you saw him.

A Yes.

On the day that I saw him, I found him to be quite sane; that is, he knew the difference between right and wrong and could assist his counsel.

He could understand everything that was going on between him and me and he was competent. He was fully capable of understanding everything I asked of him and could respond appropriately, despite the fact that he was on medications.

Well, that was what he was at the time I saw him.

Q Some time after you saw Mr. Breedlove, did you receive some materials from the State Attorney's office in connection with Mr. Breedlove's case?

A Yes.

Q Would you tell the members of the jury what materials you received.

A I did have an opportunity to see the constitutional

rights warning when he was interrogated, with the initials in response to the questions asked of him, as to waiving his rights and so on, and I had the opportunity to see the confession, the interrogation of him on Tuesday, the 21st of November, 1978, and also the questioning of him on November 25, 1978.

Then I also had some material that apparently had been furnished from California, in terms of prior difficulties, examinations, and so forth.

Q Doctor, are you aware of the purpose of this hearing today?

A Yes.

Q Do you understand Mr. Breedlove has been found guilty of first degree murder?

A Yes.

Q Are you aware that you are going to be questioned as to whether he was under the influence of an extreme mental or emotional disturbance at the time of the crime, as well as whether at the time of the crime, he had the capacity to appreciate the criminality of his acts? Are you aware of that?

A Yes.

Q Doctor, bearing in mind those two mitigating factors that I have just mentioned to you, would you tell the jury, as best you can, what your findings were with

respect to Mr. Breedlove, as well as the most favorable things you can say on behalf of Mr. Breedlove, bearing in mind the things I mentioned.

A There is no doubt about some long-standing difficulty that he has had in terms of his behavior, in terms of his prior activities, in terms of his prior hospitalizations in trying to determine whether he could be treated for sexual disorders and so forth.

We know he has long-standing behavioral and personality difficulty, both in terms of psychosexual problems and in terms of prior criminal activities.

Also, he has problems which basically relate to prior activities with alcohol and drugs. I saw nothing to indicate that he was actively psychotic; that is, out of contact with reality.

I saw nothing to determine that he was seriously disturbed. His problems were his sexual behavior and acting out with drugs and other criminal activities.

Q Are you aware of the term "sociopath"?

A Yes.

Q Could you tell the members of the jury what a sociopath is.

A A sociopath is a behavioral or personality disorder which manifests itself in terms of behavior. It has nothing to do, basically, with the person's capacity to understand,

reason, and to be in contact with reality. It is differentiated from the neuroses and differentiated from psychosis.

For example, a schizophrenic disorder is a psychosis. This sociopathic disorder, which we used to call the psychopathic personality, is manifest--in other words, it shows its disturbance in terms of acting out or disturbed behavior; not the thinking, but the behavior.

Q You are a medical doctor, correct?

A Yes.

Q Did you find any evidence that McArthur Breedlove suffers from organic brain damage?

A No. There was nothing that showed overt--in other words, open--or clinically evident organic brain damage.

There were certain little features that can suggest some difficulties, such as his inability to retain, recall, specific numbers or to calculate well. Of course his education was limited.

I did have an opportunity to see that even back as far as 1969, he was found to have an IQ, intelligence quotient, of 88, which is borderline, but of sufficient capacity to understand such things as right and wrong; such things as the possible consequences of wrong behavior, and so on.

These things did not suggest in any way psychosis

or serious organic brain difficulty.

Q Did you find evidence that this man had a major mental disorder?

A No. I didn't see anything that suggested his having been psychotic at any time, in terms of what he described to me, or in terms of the material that I saw from the background.

Q You described what a sociopath is. Would you say that McArthur Breedlove fits the definition of a sociopath?

MR. LEVINE: Objection; asked and answered.

THE COURT: Overruled.

A Yes. I think that all the behavior that has been described is sociopathic behavior. In other words, antisocial or against-societal-living type of behavior; the behavior that most of us would not have, ordinarily.

Q Would one of the characteristics of a sociopath be that the person can know right from wrong and just not care?

A Absolutely.

Q One other thing, if I may: Making reference to State's Exhibit No. 1 for purposes of this hearing, Doctor, based upon your examination of Mr. Breedlove, were you able to form an opinion as to whether the crime for which Mr. Breedlove is to be sentenced--that being, murder

in the first degree--whether that crime was committed while Mr. Breedlove was under the influence of extreme mental or emotional disturbance.

A I saw nothing in my contact with him that would suggest that in the materials that I had, describing the activities at the time of the offense. Both from his description, in terms of the statements that he had made, and the others, there was nothing to suggest he had been in that disturbed a mental state.

Even if he had been involved with alcohol or drugs, it was not of sufficient power to render him incapable of what he was doing or what was happening to him.

Q Did you find the capacity on the part of the defendant to not appreciate his conduct or to conform his conduct to the requirements of the law was substantially impaired?

A I don't think, as far as knowledge of criminality, but as far as acting out behavior, the sociopath has a certain amount of impairment. If he wants it, he takes it and so on. In that sense, there was a certain amount of involvement, but otherwise, in terms of a major mental disorder, in terms of not knowing what could happen, he was not that limited.

MR. GODWIN: No further questions.

CROSS EXAMINATION

BY MR. LEVINE:

Q Were you aware what medication, if any, the defendant was taking when you saw him?

A Yes.

Q What medication?

A Trilafon, as I understand, about 24 milligrams per day.

Q What is the purpose of that medication?

A It is a strong psychotropic drug, usually used to either relax an individual who is very agitated or to improve his thinking, if he is having thinking difficulty.

Q Don't those drugs mask any psychotic symptoms? Is that not the purpose of it--to alleviate psychotic symptoms?

A The purpose is to alleviate psychotic symptoms if they are there or to relax the individual, if he is sufficiently agitated to need something to control him, but they do not mask this.

If they are effective and there is truly a psychotic disturbance, then they help the person re-adjust so he is no longer a psychotic.

Q Have you ever seen the defendant when he has not been taking medication?

A No.

Q You said you noticed no features that suggest organic brain damage. Did you do a neurological test?

A No. There was nothing that grossly suggested it.

Q Did you perform any psychological tests on him?

A No. Didactic tests such as the Rorschach or IQ, no, but a psychiatric examination is one big mental test, and the evaluation of it is, also.

Q Are there not psychological tests that indicate brain damage, and if those were in fact present, you would have ordered a neurological examination?

A There are tests.

Q What tests are those?

A The IQ test would show, first of all, if there was organic brain damage.

Then the other tests, where they draw certain diagrams. They have to be of a certain contiguity to each other. If they put dots all over the page, then there is something to indicate---

Q Is that the Gestalt?

A Bender-Gestalt.

Q Bender-Gestalt?

A Yes.

Q Did you perform that test?

A No.

Q That test, if given, can in fact indicate organic

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damage.

A It can suggest the possibility of organic brain damage, yes.

Q Isn't that one of the purposes of giving that test?

A Yes.

Q Is it not a fact that you noted that the defendant has long-standing extensive psychological problems?

A True.

MR. LEVINE: No further questions.

THE COURT: Anything else on redirect?

REDIRECT EXAMINATION

BY MR. GODWIN:

Q Was he sane?

A Yes.

MR. GODWIN: That is all I have.

THE COURT: Ask your next witness to come in.

[Witness excused]

MR. GODWIN: Dr. Mutter.

THE COURT: That is a copy of mine.

MR. LEVINE: Thank you, Judge.

THE COURT: Remain standing to be sworn.

Thereupon:

CHARLES B. MUTTER

was called as a witness on behalf of the Plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GODWIN:

Q Doctor, please state your name and spell your last name for the court reporter and tell the members of the jury what your occupation is.

A Yes. Dr. Charles B. Mutter, M-u-t-t-e-r. I am a physician, specializing in the practice of psychiatry.

Q Can you tell the members of the jury what your background and what your training is for your position in psychiatry.

A Yes. I have had thirteen years of training; four years of college, followed by a year of graduate school, followed by four years of medical school, which was completed in 1959.

This was followed by one year of internship, and then three years of residency training in the specialty of psychiatry and neurology.

Q Doctor, are you a member of any associations or organizations with respect to your field of psychiatry?

A Yes.

Q Could you tell us briefly what organizations you belong to.

A Yes. I am a fellow of the American Psychiatric Association, a fellow of the American Group Psychotherapy Association, a fellow of the American Geriatric Society, a member of the American Medical and Florida Medical and Dade County Medical Societies, a member of the Florida and South Florida Psychiatric Societies, a member of the American Society of Clinical Hypnosis, a member of the International Society of Hypnosis, a member of the American Academy of Forensic Science, a member of the American Academy of Psychiatry and the Law.

Q Do you hold any teaching positions?

A Yes, sir. I am a clinical instructor at the University of Miami School of Medicine in both the departments of psychiatry and family medicine.

I have been a guest faculty member at the University of Pennsylvania School of Medicine. I am also a lecturer in psychiatry at the school of nursing, Jackson Memorial Hospital and the University of Miami.

Q Have you been recognized, on previous occasions, as an expert in the courts of the State of Florida in the field of psychiatry?

A Yes.

Q On how many occasions?

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A Many hundreds. I don't know, exactly.

Q Have you been recognized as an expert by His Honor, Judge Fuller, in the field of psychiatry?

A Yes, sir.

Q Have you, in fact, been retained by Mr. Zenobi of the Public Defender's Office as an expert in the field of psychiatry on numerous occasions?

A Yes.

MR. GODWIN: Offer him as an expert.

THE COURT: The same basis. Subject to cross and evaluation by the jury.

Q [By Mr. Godwin] Dr. Mutter, did you have occasion to perform a psychiatric examination of Mr. McArthur Breedlove?

A Yes.

Q Do you see him in Court today?

A Yes, sir. I am pointing to him.

MR. GODWIN: Indicating for the record, Mr. Breedlove.

Q [By Mr. Godwin] What day was that?

A February 20, 1979.

Q How was it that you came to evaluate Mr. Breedlove?

A This was by order of this Court.

Q You were not retained by the State Attorney's Office?

A No, sir.

Q Nor by the Public Defender's Office.

A No, sir.

Q You were appointed as a neutral independent expert. Is that correct?

A Yes, sir.

Q Would you briefly tell the members of the jury what your general findings were with respect to Mr. Breedlove?

A It was my opinion, at the time I examined him, he was able to aid counsel in the preparation in his defense to stand trial, and regarding the question of his mental state at the time of the alleged offense, I rendered the opinion that he did know right from wrong and understood the nature and consequences of his acts.

I felt it might be possible that he had a diminished capacity, as a result of drugs and alcohol intoxication; however, I felt this was on a voluntary basis on his part and he had this type of problem over a prolonged period of time.

Q Either shortly before or shortly after you saw Mr. Breedlove, did you receive some information from the State Attorney's Office in connection with this case?

A Yes, sir. I did see the information after I rendered this report.

Q What information did you receive?

A I believe it was a confession or a statement made by the individual.

Q Just briefly tell the jury what it was, without going into the contents of it.

A I believe there were some constitutional rights warnings that were acknowledged by the individual. In fact, I have them listed here, if you want them specifically.

Q It is not necessary.

A And there are two statements made.

Q Two statements? All right.

Let me just see the two statements, if I may.

Doctor, are you aware of the purposes of this hearing today?

A Yes, sir. I believe so.

Q Are you aware that Mr. Breedlove has been found guilty of first degree murder?

A Yes, sir.

Q And one of the questions that the Court or the jury is concerned with is whether, at the time Mr. Breedlove committed this crime, he was under the influence of extreme mental or emotional disturbance, and another question is, whether the capacity of Mr. Breedlove to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Are you aware of those two questions?

A Yes, sir.

Q Concerning those two questions and based upon your

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own examination of Mr. Breedlove, can you tell the jury the most favorable things you can say on Mr. Breedlove's behalf in connection with these questions?

A I think this man has had emotional problems for a prolonged period of time, from childhood or adolescence, which has been manifested by his misuse of drugs.

I think he is probably in need of some form of psychiatric treatment for a prolonged period of time.

Q Are you aware of the term "sociopath"?

A Yes, sir.

Q Would you tell the members of the jury what a sociopath is.

A Yes, sir. A sociopath is an individual who has had a personality disorder or disturbance which usually starts in childhood or early adolescence, and it is characterized by an individual who has great difficulty getting close to other people.

He is an individual who is able to rationalize his behavior. In other words, make excuses for it.

He has difficulty accepting responsibility for his own behavior. He is not usually remorseful, but seems not to be able to benefit from his experiences. He seems to make the same mistakes over and over again.

He has a poorly developed conscience, or what we call a superego. In other words, he really does not have

much remorse or guilt other than remorse for being caught.

He seems not to be able to have any particular loyalty towards anyone for a prolonged period of time. He is usually reasonably bright and is able to maneuver a situation with individuals he can manipulate and maneuver.

Some people call this type of an individual a con artist. He is a good salesman. At times, he can cause people to have empathy or feel sorry for him.

He sometimes will willfully manipulate an environment or falsify information, and the other aspect is that these individuals not only do not have any loyalty to people, but even those in the same situation they are in.

Q Did Mr. Breedlove fit the definition of a sociopath?

A Yes, sir.

Q Did you find any evidence that Mr. Breedlove was suffering from a major mental disorder?

A No, sir.

Q Was he psychotic?

A No, sir.

Q Would you diagnose him as a schizophrenic or paranoid schizophrenic?

A No.

Q Did you find any medical evidence that he was suffering from any brain damage?

A No.

Q Would it be fair to say that in a sociopath, one of the characteristics would be that the person knows right from wrong and just does not care?

A Yes. I would say that would be one of the criteria.

Q Let me ask you this: Again, referring to what is marked as State's Exhibit No. 1 for purposes of this hearing, did you find that the crime for which the defendant is to be sentenced--that being murder in the first degree--that the act was committed under the influence of extreme mental or emotional disturbance, in your evaluation from your examination in this case?

A No. I think he always had difficulty, but I wouldn't call it extreme.

Q What would be your opinion as to the capacity of the defendant to appreciate the criminality of his acts, or if his ability to conform his conduct to the requirements of the law was substantially impaired?

A No. I do not feel it was substantially impaired.

MR. GODWIN: No further questions.

CROSS EXAMINATION

BY MR. LEVINE:

Q When you saw Mr. Breedlove, was he taking any medication?

A Yes.

Q What medication was he taking?

A The medication he was taking was listed as Trilafon.

Q What is the purpose of that medication?

A Trilafon is a tranquilizer. It is a major one, which has been used for anxiety in low doses and may be used for what we call a psychotic, severely disturbed mental state, in high doses.

Q What dose was the defendant getting?

A According to the records he was receiving 24 mgs. at bedtime. That was given on February 9, 1979, because I copied that from the jail record.

Q What other drug do you note on the jail record?

A He was taking Benadril, 100 mgs. at bedtime.

Q What is the purpose of that?

A Benadril is an antihistamine and is used to counteract the side effects the Trilafon would produce.

Q What others?

A Those are the only ones I saw.

Q Did you note any Mellaril?

A Yes. His medications have been changed many times. He had taken Mellaril and another one called Haldol. At the time I examined him, it was discontinued.

Q What are those?

A The same type of drugs as Thorazine. Mellaril is a major tranquilizer, an anti-psychotic drug in high doses.

Q Haldol?

A Haldol is not in that exact classification, but it is used for the same problem, but he was not on that medication at the time I saw him.

Q He was taken off some medications?

A His medications vary according to the jail records, yes.

Q Is that not consistent with the treatment of schizophrenia?

A It could or it may not be. It is also consistent with people who have severe drug addiction problems, because when people take high doses of drugs and withdraw, they can get serious side effects. One of the uses of this type of medication is so they do not get adverse reactions.

Q You have never become aware of anything that would indicate the defendant was actually physically addicted to heroin or anything like that, did you?

A In terms of my observations of his behavior, I take him at his word in saying that he has used drugs for a long period ot time, but withdrawal symptoms or anything of that nature when I examined him, the answer is no. Had he been withdrawn from that, which he obviously was when he was put in jail, he would have been long past that stage.

Q But they were still treating him with all those psychotropic medications?

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A Just one.

Q Which one?

A Trilafon.

Q He never told you he used heroin. He told you he used LSD. Is that correct?

A The man told me he used all kinds of things, but if you are asking me specifically "heroin," yes, he said on occasion he used heroin intravenously.

Q He never said he was a heroin addict.

A He didn't say that to me, no.

Q He told you he had at least 50 LSD trips.

A Yes.

Q What can be the results of 50 LSD trips on somebody?

A Well, again, it depends upon the strength and the quality of the drug given. Some people can have minor aberrations, distortion of things they see, to hallucinations or delusions. Some people jump off buildings. It can be very severe.

Q Can it have permanent effects?

A It can, but that is still controversial. There are some reports in literature saying there are some permanent effects from this; others say there is no overt evidence.

Q Did you do tests for organic brain damage?

A Clinical tests, but not psychological tests.

Q Is it not a fact that during the course of your

examination, although the defendant's judgment was fair on formal testing, it was grossly impaired in terms of lifestyle.

A Yes.

Q Did you not find on examination that his insight is nil?

A That's correct.

Q From your examination, as a result of alcohol and drug abuse, you found he did have a diminished mental capacity.

A I would say it's possible that he had a diminished capacity as a result of drug and alcohol intoxication, yes, sir.

Q You were talking about a sociopath being bright. Did you ever give the defendant an I.Q. test?

A No.

Q You also mentioned that the sociopathic person first exhibits these symptoms in childhood. Did I understand that correctly?

A It usually starts in childhood. It might blossom later in life.

Q Do you know what causes it to appear in childhood?

A No one knows the answer to that one. It is just a behavior disorder. Many people feel it has to do with the environment, or it can be due to hereditary factors.

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Nobody knows the cause. They know how it shows itself clinically.

Q So in fact a five year old child can have a sociopathic personality. Is that correct?

A No. It is usually late in the childhood or early adolescence, twelve or thirteen years old, where it can begin to manifest itself.

Q The causes could be environmental or hereditary.

A Nobody knows for sure. The major belief now theoretically is that environmental factors cause it.

MR. LEVINE: No further questions.

REDIRECT EXAMINATION

BY MR. GODWIN:

Q Doctor, with respect to the drugs Mr. Breedlove was taking or that can be used to treat various conditions, did you find any evidence Mr. Breedlove was malingering in any way?

A I felt he was. He knew more than he was telling me and I felt that he was trying to manipulate me throughout the interview, yes. I believe I stated that in my report.

Q I believe you just indicated that you did find that Mr. Breedlove had a diminished mental capacity. Is that correct?

A I said it is a possibility, which I said in my report.

Q Assuming he does have some diminished mental capacity, is his mental capacity so diminished that he could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law?

A No.

Q Can he appreciate the criminality of his conduct?

A Yes.

Q He knows when he is committing a crime?

A Certainly.

Q And can he conform his behavior to the requirements of the law if he wants to?

A Yes, sir.

MR. GODWIN: No further questions.

THE COURT: Anything else?

MR. LEVINE: Nothing further.

THE COURT: Any other witnesses?

MR. STELZER: Nothing from the State.

The State rests on rebuttal.

THE COURT: During the course of our break, gentle-ladies and men, we have had a chance to meet with counsel and provide them with a copy and worked with the copies of the instructions which will be given to you in just a few moments.

The law affords each counsel, should they choose, to make to you at this time a brief argument in

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discussing with you the factors that you might consider in arriving at your recommendation to the Court, and of course, the facts that counsel may argue to you in discussing these factors with you may have come either from this hearing or from the trial that was previously held, and I will, of course, give you further instructions as relates to that at the close of counsel's argument.

The State will argue first and the defense will argue after that.

They have agreed upon a limited period of time which I think is quite satisfactory for all concerned.

Immediately upon the conclusion of their arguments, I will charge you on the law again and give you a copy of my instructions and allow you to deliberate on your recommendation.

Who is going to argue for the State?

MR. STELZER: I will, Your Honor.

Your Honor, Mr. Zenobi, Mr. Levine, members of the jury. This is the closing phase of this trial.

It has been a very long and involved process. This is the judicial process, as it works in the State of Florida and as it has worked in this case.

You have been here for over a week.

Now, you have tried a person for first degree

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murder, and now we enter the final stage of the proceedings known as the penalty phase, and the final part of the penalty phase is known as the summation, where we will go over these aggravating and mitigating circumstances we have been talking about for such a long time.

Before I say anything else, since this is probably the last time I will have an opportunity to talk to you, and after I talk to you, Mr. Levine will go after me and that will be it, and then you go back and deliberate again, let me thank you on behalf of myself, Mr. Robert Godwin, the Assistant State Attorney who tried this case with me, and on behalf of the State Attorney, Janet Reno, the State Attorney of the State of Florida.

We appreciate the consideration you have given to this case and the fact that you have reached a fair verdict.

We want to thank you for your participation in the legal process. We know you will reach a fair verdict and you will go about your lives knowing you have reached a fair verdict in this case.

Do you remember in the beginning, in the first part known as the voir dire examination, Mr. Godwin and I asked you questions. After Mr. Godwin asked you questions it was my turn to ask you the questions, and I asked you

only about this area which related to capital punishment.

If you recall, I asked you questions about your general, deep-seated beliefs, as they relate to capital punishment.

All of you stated back then that you feel capital punishment is necessary and is something that should be applied under appropriate circumstances.

If you will recall, everybody was careful to ask you whether or not you can cast aside your own feelings of what is and what is not appropriate circumstances for capital punishment and follow the law of the State of Florida, and all of you said you could, in fact, follow the law of the State of Florida, because it is those people whom you elected and sent to Tallahassee as well as the United States Supreme Court that has decided exactly what factors do and do not constitute the type of case to warrant the imposition of capital punishment.

In other words, you are given guidelines as to exactly what to recommend to the Judge, and again, I emphasize the word "recommend."

Nothing you have done in this case has been easy so far. Nothing you are going to do from this point on in the case is going to be any easier than anything you have done so far.

You had a tough job so far. You have a tougher job coming up now, but what you have got to do is bite down hard on the bullet and ask yourself whether or not this case fits into the legislative criteria for the imposition of capital punishment.

You are to go into the jury room and make a recommendation, not a recommendation based on sympathy, bias, prejudice, or anything like that, because you are going to be told by the Judge to ignore sympathy, prejudice and bias, but you are to reach a verdict based upon the law, which is what you did in the first part, and what you are being asked to do now in the second phase of this trial.

The one thing I want to emphasize again--and I do not think I can emphasize enough--is that you are not sentencing anybody to death. When you were determining the guilt or innocence of this defendant, you were looking at the facts of the case and whether those facts proved the defendant guilty or proved the defendant not guilty.

What you are doing now is looking at the facts, as well as those lists of aggravating and mitigating circumstances and simply determining whether there are sufficient numbers of the aggravating circumstances, and if so, whether they outweigh the mitigating

circumstances. You do not have the power to pass sentence on anybody, and you are not being asked to pass sentence on anybody.

There is only one person in this courtroom who can pass sentence on anybody. Maybe the defendant, of course, passed sentence on himself many years ago when he embarked on this career of his, but in the courtroom today, there is only one person who can pass sentence, and that is Judge Richard Fuller.

What you are being asked to do here is to make a recommendation to the Judge.

In fact, your verdict form will say, "We, the jury, recommend this or recommend that."

In fact, the Judge can overrule you, if he does not think you applied the law appropriately to the facts.

So keep in mind that what you are doing here is simply making a recommendation as to what is an appropriate sentence, and your recommendation is based upon the law of the State of Florida.

Now, we have talked all this time about things known as aggravating factors and things known as mitigating factors, and now is the time you are going to have to decide if there are more aggravating than mitigating factors or vice versa.

There is this chart that has been prepared for you to see exactly what is considered an aggravating circumstance and what is considered a mitigating circumstance, and you are to be told at the conclusion of these proceedings that your job is to consider, first of all, whether there are sufficient numbers of aggravating circumstances. You are not going to be told that there has to be all of them here; just whether there is a sufficient number of aggravating circumstances present in this case, and if you find there are, whether there are sufficient numbers of mitigating circumstances to outweigh whatever aggravating circumstances might be present during this case.

So in order for you to properly know what your duty is in this case, let's take a few minutes and go through the aggravating versus the mitigating circumstances which you are now going to be required to weigh and consider prior to the time you make a recommendation to Judge Fuller as to what sentence Judge Fuller should apply in this case.

Aggravating circumstance No. 1: "The crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment."

Well, the defendant was not under sentence of imprisonment when he committed this crime. He did not

kill a jail guard. He may have been on parole from his 1969---

MR. LEVINE: Objection.

THE COURT: Sustained.

MR. STELZER: Clearly the defendant was not under the sentence of imprisonment, so therefore, you are not to use No. 1 in applying that to your recommendation, because it does not apply to this case.

No. 2: "At the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person."

That applies clearly to this case. You heard testimony from Sergeant George Blishak, a sergeant with the police department of Los Angeles, California. Sergeant Blishak testified that back in 1968, he had occasion to respond to 1341 West Olympic Boulevard, in Los Angeles, California.

A person there had called the police, a person by the name of Hedda Schuhbaum, who had heard a noise and tried---

MR. LEVINE: Objection and we would like to make objections at the end of his argument rather than to keep interrupting and reserve our right to make motions at a later time.

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THE COURT: All right. Thank you.

MR. STELZER: Ms. Schuhbaum opened the door and instead of the police, the defendant entered and grabbed her with his hands, grabbed her about the throat, threw her back, and placed a placed a pillow over her face and it was in the act of trying to strangle her at the same time as committing the act of rape that the police arrived and the defendant lunged at the police and the police took appropriate action.

You heard the testimony that prior to that, thirty minutes earlier, approximately three or four blocks away, the defendant had entered an apartment or a house at 1021 South Albany Street, Los Angeles, the home of Mrs. Angie Meza. She heard a noise in her child's bedroom, and when she walked in the bedroom to see what was going on, she was knocked over by the defendant. The defendant knocked her onto the floor, stuck his hand over her mouth, and the defendant heard a noise and ultimately ran away.

The defendant was charged with assault with intent to commit rape on Mrs. Meza, assault with intent to commit rape on Ms. Schuhbaum, and of course the burglary of Ms. Schuhbaum's apartment.

Clearly No. 2 applies because the defendant has been convicted of two, maybe three crimes involving the

use and threat of violence to these people in California back in 1969.

No. 3: "The defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons."

Well, in committing the murder of Frank Budnick, there is no doubt about the fact that he created a great risk of death to Carol Meoni.

MR. LEVINE: Objection and reserve the right to make motions later. They found him not guilty.

THE COURT: Go ahead.

MR. STELZER: Clearly, in the act of swinging the knife at Mr. Budnick in bed next to Carol Meoni, a tremendous risk of death was created as to Mrs. Meoni. In fact, as you will recall the evidence from this case, there was a knife wound in the chest of Mr. Budnick, defense wounds on the hands of Mr. Budnick, which were apparently made when he raised his hands to stop the blow, as well as wounds and slash marks in the pillow case, and wounds on the fingers and face of Carol Meoni.

The question is, whether or not that is creating a great risk of death to many persons. Well, risk of death to Carol Meoni, yes. Risk of death if somebody else had been in that house, yes.

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MR. LEVINE: Objection and reserve the right to make motions.

THE COURT: All right. Go ahead.

MR. STELZER: However, since the aggravating circumstance talks about a great risk of death to many persons and there was only one other person who had a risk of death applied, we will not use this aggravating circumstance, because it is questionable as to whether or not it applies.

No. 4: "That the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of or in an attempt to commit any robbery, sexual battery, burglary, kidnapping," et cetera, et cetera.

Clearly we know that the defendant was engaged in the act of burglary. Whether or not he was engaged in the act of attempting a sexual battery on Carol Meoni we do not know, because he was surprised by Mr. Budnick inside the bedroom.

What would have happened had he not been surprised, based upon what he did in the bedroom---

MR. LEVINE: Objection and reserve the right to make motions.

THE COURT: All right, sir.

MR. STELZER: I point this out for a specific

reason which I will tell you in a minute.

As to whether he was engaged in just a burglary or as to whether he was engaged in a sexual battery, we do not know. We will get to that in a minute.

MR. LEVINE: Objection.

THE COURT: All right, sir.

Your objection is noted.

MR. STELZER: No. 5: "The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody."

That is clearly applicable to this situation. There is one reason and one reason alone that Frank Budnick was murdered: The defendant did not know Frank Budnick from a hole in the wall. Frank Budnick woke up during the course of a burglary and said, "What are you doing," to the defendant and the defendant says he grabbed him and he flicked his wrist and it happened to go into the body of Mr. Budnick.

That is a lot of baloney. That is a lie by the defendant for whatever reason. Regardless of whether the defendant is telling the truth or not, clearly circumstance No. 5 applies, because the reason that this murder was committed was so the defendant could prevent himself from being apprehended during the course

of the burglary. No. 5 applies beyond any doubt whatsoever.

No. 6: "The crime for which the defendant is to be sentenced was committed for pecuniary gain."

Was he looking for money when he did it? There isn't any doubt about that. That is the reason the burglary was committed. He took the watch, money. Pecuniary gain, certainly.

Let's go back to the statement I made as to No. 4. In fairness to the defendant, the legislature of the State of Florida has provided that if in fact a person was committing a felony such as burglary, obviously burglary has as its motive, money, which is pecuniary gain, and you cannot hold No. 4 and No. 6 against him because both of them are talking about pecuniary gain.

The crime was committed for pecuniary gain, and that is why he did a burglary, so if you find that he was only committing a burglary under No. 4, then you cannot hold both No. 4 and No. 6 against the defendant.

On the other hand, if, based on what you have now learned and now heard, you feel that part of what the defendant was doing in this crime was an attempted sexual battery of Carol Meoni, then you may hold No. 4---

MR. LEVINE: Objection and renew my motion.

THE COURT: All right, sir.

MR. LEVINE: And reserve my right to make motions after his argument.

THE COURT: All right. Go ahead.

MR. STELZER: If you find that to be so, then since the sexual battery has nothing to do with pecuniary gain and nothing to do with money at all, then you can hold circumstance No. 4 and circumstance No. 6 to be applicable to this case. That will be your decision to make when you retire back to the jury room.

MR. LEVINE: Objection as to that last statement. Sexual battery was never even charged.

THE COURT: Overruled.

Go ahead.

MR. STELZER: No. 7: "That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws."

Forget about that one.

No. 8: "That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel."

A definition of what is heinous, atrocious, or cruel will be given to you by Judge Fuller when he gives you the instructions on the law applicable to this case.

Judge Fuller will tell you that heinous and atrocious mean outrageously wicked, and that cruel means designed to inflict a high degree of pain or utter indifference to or the enjoyment of the suffering of others or pitiless, and I ask you whether or not the defendant in this case has shown complete and utter indifference about the suffering of Frank Budnick.

You heard about the suffering of Frank Budnick. You must decide for yourself whether you believe this crime to be heinous, atrocious, or cruel.

You must decide whether the act of plunging this instrument into the body of Frank Budnick to the point of the hilt of the knife was heinous, atrocious, or cruel; was something completely and totally pitiless and without regard and indifferent to the suffering of others.

I submit beyond any doubt whatsoever No. 8 applies to this case.

Now we move over to the mitigating circumstances. You must decide whether there are sufficient aggravating circumstances, and if there are, whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances found to exist.

No. 1: "That the defendant has no significant history of prior criminal activity."

That does not have anything to do with this case. You know about his history.

No. 2: "That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance."

Let's pass that one for a minute.

No. 3: "That the victim was a participant in the defendant's conduct or consented to the act."

Clearly Frank Budnick was not a participant in any conduct that the defendant engaged in, and clearly, Frank Budnick did not consent to being stabbed through the chest with that butcher knife. That does not apply.

No. 4: "That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor."

There was no other person involved in this case. The defendant's participation was the only participation. Nobody else participated in it. That does not apply in this case either.

No. 5: "That the defendant acted under extreme duress or under the substantial domination of another."

Nobody was forcing this defendant to do this act.

He was not under the domination of anyone. No one was applying duress to this man to get him to do what he did. No. 5 does not apply, and No. 6, we will skip for a minute.

No. 7: "The age of the defendant at the time of the crime." This man is not twelve, fifteen, seventeen, or nineteen. He is thirty-one. No. 7 is talking about a child such as Ronnie Zamora.

MR. LEVINE: Objection.

THE COURT: Overruled.

MR. STELZER: That is talking about a person who is twelve years of age or you are talking about a person who is sixteen years of age.

If he does not get sentenced to capital punishment, this man is going to be eligible for parole at the time he is fifty-six, and---

MR. LEVINE: Objection and reserve the right to make the proper arguments as to the last comment.

MR. STELZER: Let me go back to 2 and 6.

You all heard a lot of mumbo jumbo, of course, but you heard all this testimony about it, and the key words here are the words "extreme" and "substantially."

Of course, you heard from the defense, the people who the defense hired to come in here and tell you about Mr. Breedlove.

Those people were hired by the defense and they came in here and told you, "Well, the defendant isn't bright. He doesn't perform well on tests, based on what he drew. He drew a house, a tree, and a person's figure, and I don't think his mind functions that well."

Well, members of the jury, nobody who commits first degree murder or burglary or assault with intent to commit rape is all there. Obviously you or I would never do it. Those people who commit crimes like that are obviously abnormal, because society's norm is not to commit those crimes.

The question is whether or not he was under such extreme mental or emotional disturbance at the time he committed the crime as would vitiate everything that happens here, or whether his capacity to understand the law or to appreciate the consequences of what he was doing was substantially impaired.

We are not talking about somebody who goes out and commits a murder with a banana hanging out of his mouth or who goes out stark-raving naked with a machine gun. That is what they are talking about here--somebody who is completely nuts.

MR. LEVINE: That is a misstatement of the law.

THE COURT: Overruled.

MR. STELZER: Keep in mind that those witnesses

were psychiatrists, not psychologists. They were doctors, highly-trained, court-appointed psychiatrists. Dr. Mutter and Dr. Jaslow were not hired by the defense, but they were appointed by the Court. They came in and told you he was not suffering from any extreme mental or emotional disturbance. He did not have any substantial impairment in understanding his conduct. He knew what was going on.

Those other psychologists, they can give whatever tests they want, but as to the question of how somebody was acting and did he know what was going on, or was he completely out of his mind at the time he did it, you cannot tell that without knowing how the person acted, and nobody the defense hired to come in here and try to persuade you that these factors apply, none of those people looked at the defendant's confession. None of those people looked at the police reports. None of them looked at the reports from the doctors in California who declared him whatever they declared him.

Dr. Mutter and Dr. Jaslow looked at all of these factors. They looked at what the defendant did right after the time he committed the murder, and that is the only way you can tell whether he was substantially impaired or whether he had an extreme mental or emotional disturbance.

Was he so disturbed that he did not know what to do after this murder took place? Was he so disturbed after committing this murder that he walked into the Dade County Public Safety Department Headquarters and confessed, said, "I did it"?

Oh, no, no, no. What he did was, first of all, before he committed the crime, he put socks over his hands, knowing what he was doing, to keep from leaving fingerprints inside of there.

Immediately after the crime takes place, he runs out and steals a bicycle on which to make his getaway. After that, the defendant goes home, notices that there is some blood on himself, and he is not crazy. He is smart. He does not want to get caught.

He takes a razor and takes the blood off his pants and throws them in the Dempsey dumpster, where they will not be recovered.

A couple of days after that, he furnishes a false name to a police officer to conceal his identity. He takes the watch he stole to Hallandale and sells it to some junkie, as the defendant said in his confession, and you have to ask yourself, "Is this the action of a man who does not know in his own mind what he is doing, or does he know precisely what he is doing."

As Dr. Mutter and Dr. Jaslow said, he knew what

he was doing. He knew it was wrong and it was a crime and it was against the law.

This man is a sociopath. He knew what he was doing was against the law. He couldn't give a damn. He couldn't care less.

I submit to you, despite what you heard, the opinions of the court appointed experts, Dr. Jaslow and Dr. Mutter, were clear and unequivocal. Those were the people who looked at all the background material and made an intelligent decision. The intelligent decision that they made was that he was not under a severe emotional disturbance and his capacity to understand what was going on was not substantially impaired.

All you have to do is take a look at the confession. He is intelligent. He was able to say to Ojeda, "You won't find my prints. Oh, no. Not my prints. I wore socks."

Those are not the actions of a man who is out of his mind and does not know what he is doing. Those are the actions of a man who knows full well exactly what he is doing and just does not care about anything except getting caught.

The aggravating circumstances in this case are present, are numerous, and clearly outweigh the mitigating

circumstances, because there are not any.

According to the legislature of the State of Florida, that is what you are to consider, and according to the legislature of the State of Florida, the aggravating circumstances outweigh the mitigating circumstances in this case, because there are no mitigating circumstances in this case whatsoever.

You can talk about sufficient aggravating and mitigating circumstances and you weigh it, and if you follow the law, then the only appropriate recommendation, if you follow the law, the recommendation which you must make, whether you like it or not, based on the law of the State of Florida, is a recommendation that "the aggravating circumstances do in fact, Judge Fuller, whether we like it or not, outweigh the mitigating circumstances, and we, the jury, so find, because that is the law and that is the way we view this, and that is what we must tell you at this time."

But are there any other reasons why capital punishment might be an appropriate punishment in this case? What is the defendant asking for? Is he asking for life imprisonment? He is asking for a reward for what he has done. "Give me a break. Don't recommend capital punishment. Have pity on me. Give me a break. Reward me for two counts of assault with intent to commit

rape in '69. Reward me for my burglary. Reward me for my murder. Let me have my life."

MR. LEVINE: Reserve the right to make motions after the argument.

THE COURT: All right, sir.

MR. STELZER: That is what the defendant is asking you for, a break. Think about the break Ms. Meza got. Think about the break Ms. Schuhbaum got.

MR. LEVINE: Objection.

THE COURT: Sustained as to the two counts.

MR. LEVINE: Reserve our right on that as well.

THE COURT: All right.

MR. STELZER: Think about the break this man gave to Frank Budnick. The only break this guy gave to Frank Budnick was the break he gave to Frank Budnick's collarbone when he stabbed him. Look at this thing [indicating]. Have you ever seen anything more outrageous in your life?

MR. LEVINE: Objection.

THE COURT: Overruled.

MR. STELZER: The only break given to Frank Budnick was when this thing broke his skin and collarbone.

If you remember the testimony of Dr. Kessler, contrary to what this defendant wants you to believe, that "he grabbed my shirt and I picked up the knife and

it went like this [indicating]," that is a lot of baloney.

How do you know that it is baloney? There is a wound on Mr. Budnick's hand. Think about the break he got as he raised his hand to ward off the knife blow. Think about the break he got when this slashed his hand as he held it over his face to defend himself and the knife going into his chest.

The defendant did not go like that [indicating]. We know that the angle of the knifewound is like this [indicating].

According to Dr. Kessler, there is a slash mark in the pillow, Carol Meoni's face, her hand, Mr. Budnick's hand, and Mr. Budnick's chest. That is five. You have got this man using this lovely thing, going like that five times [indicating] as they lie there on the bed.

You have seen the pictures of the bed, and you know all the blood is right there on the bed.

His story in that statement as "Well, I was in the bedroom and he got up out of the bed and grabbed me by the shirt," you know that is a lot of baloney. You have seen it in the pictures. You know what happened in this case. You know exactly what is going on insofar as this case is concerned.

THE COURT: Time, Counsel.

MR. STELZER: Ask yourself this, members of the jury: "At any time, has the defendant in this case shown the slightest bit of remorse for what happened? At any time has he shown the slightest bit of remorse whatsoever?" Not at all. You have never heard one word about how sorry he is for the pain and suffering of Frank Budnick and for what he did on this occasion. Not the slightest word at all of remorse, and if you think that the one minute that the pain and suffering that Frank Budnick may have suffered is not a big deal, when I sit down, watch the second hand of that clock as it goes around on sixty separate ticks, and you think about the pain and suffering this man had when this knife was plunged into him. Think about whether he got any break whatsoever, and think about, most of all, the law of the State of Florida, because whether we like it or not, you have taken a sworn oath to follow the law, and if you follow the law and follow the aggravating and mitigating circumstance, you will find there is only one appropriate penalty to be imposed in this case, and that, members of the jury, is the penalty of death. Thank you.

MR. LEVINE: If it please the Court, Mr. Stelzer, Mr. Godwin, ladies and gentlemen of the jury: Up until today, I have not taken any part in this trial. My part today is to accept the awful responsibility of arguing to you why McArthur Breedlove should not be burned alive in the electric chair.

MR. STELZER: Objection to the term "burned alive."

THE COURT: Overruled, counsel.

MR. LEVINE: I know you have agonized over your decisio in the guilt or innocence phase of this case for seven hours. I know you will give this phase that same agonized and careful consideration.

The State has asked you to recommend that McArthur Breedlove die in the electric chair, and he tells you that is nothing more than a recommendation.

He would like to take the awful weight of this responsibility away from you, to make your decision to recommend that McArthur die a little easier.

Well, I am not going to let you off the hook so easily, and I do not think that any member of this jury wants to be let off that hook.

I think every single one of you, by your oaths, is fully ready to accept that responsibility and accept what he is asking you to do.

Now, what is it that he wants to absolve you of

doing? He makes it very easy for you.

What is it he wants you to absolve yourself of? What is it he does not want you to consider?

He asks you to recommend death. What does that mean when he asks you to recommend death? It means he is asking this man be taken, placed in a tiny cell, where he will wait and he will wait and he will wait for years, if need be, until all of his appellate processes are exhausted, and he will wait until the date that they set for him to die, and all the while he is waiting, right down the hall is the electric chair, and it is there waiting for him, and when that date is set, they come and they take him from that little cell and they place him in a little room immediately next to the electric chair, and they shave a spot on his leg and head and they attach electrodes to that.

MR. STELZER: I object.

There has been no such testimony.

THE COURT: Sustained.

Stay within the evidence in this case, please.

MR. LEVINE: Because of that ruling, I will not go into the details, and I will not revolt you with the details of what happens to a man who is burned alive in the electric chair, but since the State so flippantly asked you for your recommendation, I think it is

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appropriate that you consider what is it, what exactly is it, that he is asking you to recommend.

Why does he ask you for this recommendation? He mentions the aggravating circumstances, but it is a funny thing: I never heard him mention that these aggravating circumstances must be proved beyond and to to the exclusion of a reasonable doubt.

I did not hear him tell you that, but I believe that His Honor will instruct you that these aggravating circumstances need to be proved beyond and to the exclusion of a reasonable doubt.

What does Mr. Stelzer say about these? I am going to leave you them right there so you can follow along right there, if you want to.

Mr. Stelzer concedes that the felony was not performed while the defendant was under a sentence of imprisonment. That is obvious, and he tells you that he was convicted of a felony involving the use of force. I think that has been established by the evidence, but what else was established by the evidence as a result of that circumstance?

What happened as a result of that prior assault that they brought you in evidence? The result was that the defendant was declared a mentally disordered sex offender, and he was in prison, and I think the fact

that they brought out that this man was found to be a mentally disordered sex offender, I believe explains that aggravating circumstance, and I think you can consider that in mitigation, because the Judge will instruct that in spite of Mr. Stelzer making a list right here, these are not--I repeat not--the only mitigating circumstances you can consider, and I believe that the Judge will instruct you that you can consider anything that you deem to be mitigating, and I think, and I submit for your consideration, the fact that the defendant, when he committed that crime, was a mentally disordered sex offender.

MR. STELZER: There has been no testimony that he has ever been declared a mentally disoriented sex offender.

THE COURT: Overruled.

MR. LEVINE: Mr. Stelzer treats you to a long recitation on the third aggravating circumstance. He goes through the risk to Carol Meoni and the slashes, even though he knows you found him not guilty. He is going to treat you to that all again.

After ramming that down your throat, then he generously says, "Don't consider that one," after he subjected you again to all the evidence, which he again would like you to hear. He generously says,

"Well, don't consider that," and I ask you to consider, in your deliberations, whether that is a good faith argument or not.

The next aggravating circumstance is that the capital felony was committed while the defendant was engaged in a burglary, and that is what is charged in the indictment. That is what Mr. Godwin told you about in opening statement. That is what the indictment says.

What does Mr. Stelzer do? Because he is so fair, he raises the spectre of a sexual battery, or a rape, and he would like you to consider that too, but I think the Judge will instruct you that you are to limit yourself to the crime charged.

As he instructed you on Friday, "The defendant is not on trial for any act or conduct except that with which he is charged," but what does he do?

In the interest of fairness, he raises the spectre of a sexual battery that the defendant is not charged with; that he cannot defend against, because he is not charged with it, but no matter what I say about that circumstance, the fact that this murder was committed during the commission of a felony is an aggravating circumstance. I cannot deny that, but on the other hand, what is the flip side of that--that this is a felony murder committed during the commission of a burglary?

What did Mr. Godwin tell you in opening statement? "We concede," he said, "that the defendant did not intend to kill Frank Budnick."

He conceded that in opening statement.

MR. STELZER: Objection.

That was not conceded in opening statement.

THE COURT: Sustained.

MR. LEVINE: I think he told you the defendant is not charged with premeditated murder, meaning he did not plan or deliberately premeditate the murder of Frank Budnick.

I think that is pretty clear from his opening statement, and Mr. Stelzer cleared it up even farther in his closing argument on Friday, when he said, "We are not seeking to show this was a premeditated murder. We are seeking to show it was a felony murder."

So, he can get it within the aggravating circumstances, but the flip side of that is, he never, by their own admissions, had a premeditated design to kill Frank Budnick, and I think that is a very serious mitigating circumstance not listed on Mr. Stelzer's list, but the Court will instruct you that you can consider it.

What would be more mitigating in a case when you are asked to sentence somebody to death than if he had

no premeditated design to effect the death of another person? What would be more mitigating than that; but, I do not see that on his fair list here.

He tells you that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. I think that is clearly not applicable. He did not commit this to escape from prison, and furthermore, because this death was not premeditated, I think it is obvious, because it is not premeditated, that they cannot say it was for any purpose.

If he did not premeditate the death, then there was no purpose in his mind for the death. It occurred in the instantaneous reaction of a sick mind, in a flash, and the State concedes that by telling you it is not premeditated; so, they cannot argue that he did it for the purpose of avoiding a lawful arrest as an aggravating circumstance.

He also says, "The capital felony war committed for pecuniary gain," and he tells you that you can only use that aggravating circumstance if you do not use burglary. You can only consider that as one, but I submit to you that this murder did not occur for pecuniary gain. Isn't the legislature talking about a murder for hire or a murder to collect on insurance proceeds?

Their statement tells you that he did not premeditate the death of Frank Budnick. How could he say, if the death was not premeditated, that the murder was for pecuniary gain? What was for pecuniary gain? The burglary was. I do not deny that. The burglary was committed for pecuniary gain, but not the capital felony, but not the murder, and I deny that circumstance exists at all.

He concedes that this was not committed to bring down the government. That is again very generous, is it not?

What about the last circumstance--that it is especially cruel, heinous, and atrocious, or as the Judge will instruct you, "Heinous, atrocious, or cruel."

The Judge is going to instruct you that heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain.

How can they stylize this crime as extremely wicked or shockingly evil when they tell you he never had a premeditated design to kill? What does "evil" imply? Doesn't "evil" imply evil intent, planned premeditation? Isn't that what evil means?

I think the fact that they admit there was no premeditated murder negates that circumstance. I am not

saying this is not a horrible crime. This is a horrible crime, but what you are to consider is, "Is there anything about this crime that sets it apart from other murders," and these guidelines. I have to concede to you, say, "heinous and atrocious," but "cruel" is a little more specific, because the instruction they will read to you on cruel says, "Designed to inflict a high degree of pain."

Now, if he never intended to do this, if there was never any premeditated design to kill, how can there be a design on his part to inflict pain? He never had a design to even kill at all. How can the State look you in the eye and tell you that this was designed to inflict a high degree of suffering, when in their opening and closing statements, they tell you that it is not premeditated? They cannot. They cannot.

There is nothing to indicate here that he enjoyed it. There is nothing to indicate anything other than this was the panic-stricken act of a sick mind, and we will get into what I mean by a sick mind when we get to the mitigating circumstances.

So, I submit to you that beyond a reasonable doubt, the State has proved none of these except for the fact that this was in fact a felony murder and that the

defendant had a prior conviction.

What about the mitigating circumstances? The State tells you that this capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance.

Dr. Levy, Dr. Center, and Dr. Miller all said that it was.

Now, he would have you believe that Dr. Center and Dr. Levy, you cannot believe them because they are psychologists, and the fact is, they are psychologists, but that does not take away from the fact that they arrived at a diagnosis, as psychologists, and they said, "That factor does exist."

Dr. Miller is a psychiatrist exactly like their two doctors, and he testified that this factor does exist; that the defendant suffers from an extreme mental or emotional disturbance.

What does that mean? Isn't that semantics? What did the State's doctors testify to?

Let's see. Dr. Jaslow and Dr. Mutter conceded that the defendant has an extensive, long-standing psychological illness, and they then turn it around and say, "Oh, but, it is not an extreme mental illness."

Isn't this semantics? Didn't their doctors really tell you, by telling you that this is an extreme, long-

standing psychological illness, that that factor does exist, and even if you take the evidence in the light most favorable to the State, look at what their doctors testified to.

MR. STELZER: I will object to the comment "their doctors."

They are Court appointed.

THE COURT: The jury heard the evidence.

MR. LEVINE: The State called those doctors. Taking the evidence in the light most favorable to the State, what did they say? They said he is impaired. They did not say "substantially impaired," but we are getting into semantics again.

The Judge will instruct you that you can consider substantial, long-standing psychological illness as a mitigating circumstance, even if does not meet the level spelled out on this side, even if it does not rise to that level, but I submit it does.

Even if you feel it does not rise to the level of extreme mental disturbance, it is at the very least, by the State's own witnesses, a long-standing psychological illness.

What do we have to indicate it is more than that, which is a psychosis, an extreme mental disturbance? What do we have to indicate that? No less than four

different medicines prescribed and given to the defendant at the jail, psychotropic medicines used to treat psychosis. Not just disturbances, but psychoses, an extreme mental disturbance.

I think at the very least we have proved the defendant has a long-standing psychological illness, and I think by the Court's instruction, you can consider that.

What about the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law being substantially impaired?

I think the State's own doctor, Dr. Mutter, in response to my question "Is it not a fact that you found him to be impaired," said, "Yes."

Well, what is "substantially impaired?" I do not know. I do not know what "substantially impaired" means, but again, if you take it in the light most favorable to the State, at the very, very least, he was impaired. He is impaired in his personal dealings with people. He is impaired in his judgment, and I think that is very important, and I believe that is a non-statutory mitigating circumstance.

By "non-statutory," I mean it is not listed here, but the Judge will instruct you that you should

consider it.

What is the overall picture of this crime? What do we have? We have a man with a long-standing psychological illness, who never had any premeditated design to kill,who killed in the act of panic.

I do not think there is any way they can argue that is not what happened, because they tell you "It is not premeditated."

Now, I notice that during this trial, you jurors would take a look at the defendant, and I noticed that a lot of you seemed kind of shocked that he displayed no emotional reaction to anything.

Now, at the time of the guilt or innocence phase of this trial, you did not know that he was heavily sedated, and you did not know he was taking, as the State's own witnesses said, "major tranquilizers."

You did not know that then. You know it now. There he sits, incapable of showing any reaction, and I can only pray to God that you did not consider his demeanor induced by these drugs in your consideration of whether or not he was guilty or innocent, because you know now he is taking drugs prescribed to him by a doctor.

So why is it they have asked you to take his life? Is it for the State of Florida? I deny that.

I think the State of Florida is going to roll right on just like it has been doing whether he lives or dies.

Well, is it for the prosecutors' sake? Do they need his bloody scalp as a trophy to their legal ability?

From the way Mr. Stelzer smirked around during his argument---

MR. STELZER: I object to that.

THE COURT: Watch the comments.

MR. LEVINE: You can picture that he is in a little moot court competition. They are competing for the little trophy that says "first prize," and there is the trophy, this man's head. I will tell you, I concede right now, they are fine lawyers, and they do not need his life as a trophy to their legal ability.

So why would you kill him? Why would you recommend that he die in the electric chair? Out of vengence? out of hate? Do you hate McArthur Breedlove? Do you hate him for the illness that five doctors have recognized?

No matter how they characterized it, every single one of them recognizes a long-standing psychological illness.

Do you hate him for the illness? It is like hating someone who has cancer.

Dr. Mutter told you, "It starts in late childhood. It could be hereditary. It could be environmental."

We do not know what caused him to look and act the way he does.

Anyway, you know what causes certain types of cancer. Do you hate him for developing a cancer?

Look at a baby in an incubator. Perhaps a future sociopath. The doctor said, "It could be the result of the environment."

Do you know what awaits that baby? Does love await that baby, so that the baby may grow up to be loving? Does compassion await that baby, so that the baby will grow up to be compassionate, or does loneliness await that baby, so the baby will grow up brutal and alone? Do you hate that baby? Do you hate that baby because brutality and loneliness await him? Can you bring yourself to doit?

Look at a little child in any school yard you will go to. You will see one child who stands apart, and you wonder what caused that child to forsake the companionship and the laughter of the other children, and you want to go up to that child and ask him what makes the other children forsake him.

You want to reach out. You want to reach out to that child, and that child turns to you, and out of that

little face look those eyes, and do you hate that child for what he has become? Do you hate him for the brutality and loneliness that await him; that caused that child to have that face?

When you go home tonight, you will tell your loved ones one way or another that "A prosecutor asked me to recommend a man die in the electric chair."

You can tell them one of two things: "I condemmed the man to the electric chair," or "No. I voted for life," and you forgot what the prosecutor asked you to do.

The State of Florida does not need his death.

His Godmother, Virginia Breedlove, the woman who raised him, needs him alive. He will always be her child.

I ask you to spare her the task of claiming the burned and mutilated body of her child.

I ask you to reach out to the child McArthur once was. Reach out for the first time, as nobody has reached out before, and offer him compassion. Offer compassion to the man that that little child who nobody reached out to has become, has become out of the brutality and loneliness that awaited that little child.

I ask you to reach out and let him be treated for what he has become.

Reach out, ladies and gentlemen, and let him live. Thank you.

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CHARGE TO JURY [Fuller, Judge]

Ladies and gentlemen of the jury: It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for this crime of murder in the first degree.

Now, as you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Now, your verdict should be based upon the evidence which you have heard while trying the guilt or innocence of the defendant, and the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

A, that the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.

B, that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

C, that the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

D, that the crime for which the defendant is to be sentenced was committed while the defendant was engaged in or was an accomplice in the commission of or in an attempt to commit or the flight after committing or attempting to commit any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.

E, that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

F, that the crime for which the defendant is to be sentenced was committed for pecuniary gain.

G, that the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws.

H, that the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

Now, "heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence of life imprisonment.

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if established by the evidence, are these:

A, that the defendant has no significant history of prior criminal activity.

B, that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional

disturbance.

C, that the victim was a participant in the defendant's conduct or consented to the act.

D, that the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor.

E, that the defendant acted under extreme duress or under the substantial domination of another person.

F, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired and;

G, the age of the defendant at the time of the crime.

Now, aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment, and reason of the jury are well satisfied and convinced to the extent of having a full, firm, and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

The aggravating circumstances which you may consider

are limited to those upon which I have just instructed you; however, there is no such limitation upon the mitigating factors which you may consider.

Now, where two or more aggravating circumstances refer to the same aspect of the crime, you shall consider them as constituting only one aggravating circumstance.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense, should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given to you by the Court.

Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

Based on these considerations, you should advise the Court whether the defendant should be sentenced to

life imprisonment or to death.

Now, in these proceedings, it is not necessary that the verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

The fact that the determination of whether or not a majority recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift, and consider the evidence, all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the defendant be sentenced to death or to life imprisonment.

Now, should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows:

"We, a majority of the jury, at Miami, Dade County, Florida, this blank"--and there is a line in which you write down the date you arrive at your verdict. Again, if it is today, it should be the 5th. If it is tomorrow, it should be the 6th. Whatever day it might be

should be incribed on that line--"day of March, 1979, recommend the Court impose the sentence of death, as authorized by Florida State 775.082, paragraph (1). So say the majority," signed by your foreman on behalf of the entire panel.

On the other hand, if, after considering all the law and evidence touching upon the issue of punishment, a majority of the jury determine that the defendant should not be sentenced to death, then you should render an advisory sentence as follows:

"We, a majority of the jury, at Miami, Dade County, Florida, this blank day of March, 1979, recommend that the Court impose the sentence of life imprisonment, as authorized by Florida Statute 775.082, paragraph (1), so say the majority," signed by one of your number as foreman.

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment.

Now, you may retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court, and I would like Miss Bussey to stay with me, please and Mr. Lu Shing, for the purposes

of some further discussion concerning your duties.

MR. LEVINE: Before the jury is retired, I need to make a brief motion at side bar in order to preserve some points on appeal.

[Thereupon, counsel for the respective parties and and the court reporter approached the bench and conferred with the Court outside the hearing of the jury and the following proceedings were had:]

MR. LEVINE: You permitted me to renew my motions and make my motions for a mistrial after all the argument, but I feel, because the law requires me, in addition to moving for a mistrial, I must ask for instructions to disregard the matters that I felt were offensive. That is the reason for this motion.

Now, specifically, I would move for a mistrial on the grounds that the State, in its final argument, made his prior conduct and that prior conviction a feature of this trial, and I would move the Court to declare a mistrial, and in the event that the Court does not, to instruct the jury to disregard that.

Another factor in his closing argument was alleging the possibility of a sexual battery, supplying the requisite for felony murder, when in fact the defendant was not charged with sexual battery.

Even by the Court's own instructions, they must

disregard any conduct which the defendant is not on trial for, to wit: They have not charged him with anything other than what is charged in the indictment and/or information, and I move you to grant a mistrial, and if not, we move for a cautionary instruction on that.

I also submit that when the State Attorney appealed to the jury that the defendant was 31 and would be eligible for parole in 25 years, that argument was for the creation of the inference that if they do not give him the death penalty, he will be out in 25 years and commit another crime. That is what I thought was raised, and I move for a mistrial as to that, and if not, I move for a cautionary instruction.

THE COURT: Your motions for a mistrial are denied.

Your requests for cautionary instructions are denied.

MR. STELZER: In instructing them on aggravating circumstances, as to number four, which relates to felony murder, you inadvertently left out sexual battery, even though the statute contains sexual battery. They misprinted sexual battery out of the form.

It makes me look like an awful liar to the jury, and I am not, because that is in there.

THE COURT: I passed out two sets of instructions.

Nobody bothered to tell me that there was something bad about either set.

I got this directly out of the Ferguson case.

I think at this stage, to add in the crime you are saying, may in fact emphasize an area that should not be emphasized. I am sorry for that. It should have been pointed out to me before I gave it to them.

MR. STELZER: I request somehow it be put in there. I could get it retyped; otherwise, it makes me look like a liar in their eyes. I should not be made a liar simply because it was misprinted.

I think it can be typed in, in the appropriate place on the instructions they are going to be getting submitted to them.

Otherwise, that makes it look like I am arguing something that is not true, but it is true.

MR. LEVINE: They are to rely on the instructions that the Court gave, and if that is not what the Court instructed---

THE COURT: The purpose of the instructions is to make certain things are done right. If I make a mistake for you, I will correct it, the same as I would do for him.

MR. STELZER: I would ask that after the word "bomb," you just add the word "sexual battery."

THE COURT: I do not know whether you can get a page that matches this or not.

The only thing I think I can do is to allow the typing of this one and we could photocopy the page and submit it.

Neither of you pointed it out to me.

MR. LEVINE: That is not what the Court instructed them. I object to that procedure.

THE COURT: The matter that is in evidence is in fact a list of aggravating circumstances. The one that you prepared as evidence is in fact a list of the aggravating and mitigating circumstances.

MR. STELZER: I do not think that has it on there. Also, I had to amend that bigger chart when I realized the printer printed it up the same as on the instructions.

THE COURT: You put in a piece of evidence that is inconsistent, and I hate to make you out a liar, but I am going to leave it like it is.

MR. STELZER: All right.

[Thereupon, the following proceedings were had within the hearing of the jury:]

THE COURT: You folks may now retire for the purposes of considering your verdict.

O. C., if you would, please give this to the jury, the two verdict forms and the copies of my instructions,

and the two alternates please stay with me.

[Thereupon, at 6:00 p.m., the jury retired from the courtroom to deliberate on their recommendation after which the following proceedings were had:]

THE COURT: You two folks have been absolutely great. You have been here when you are supposed to have been.

Probably one of the hardest responsibilities anybody can have is to be an alternate juror. I am sure you now know how Earl Morrall felt when he was a backup quarterback.

I am going to discharge you from your responsibilities in this case at this time. I sincerely thank you for your efforts and for the courtesies you have extended to the Court.

Counsel are not in a position to discuss this case with you. I would prefer that you simply go about your business at this time and not get involved in it at all.

Court officers are not authorized to discuss this with you, and nobody from the State Attorney's office or the Public Defender's office or anybody else will be touching base with you to ask you your thoughts about this case.

Should that happen, you should promptly advise my office, so I can take the appropriate steps.

I suggest to you, so there will be no problem as to making the lawyers uncomfortable, that you leave us your red badges, accept our thanks for a job well done, and split. All right, thank you. God bless and thank you.

Counsel, please do not go far.

I did not order supper. We will have to wait and see, unless counsel would like me to send them a short note. I would kind of like for them to go for an hour or so.

Food is going to take a long time.

If you leave the floor, let us know, so there is no difficulty in locating you.

MR. LEVINE: We will be on the floor, Judge.

THE CORRECTIONS OFFICER: Do I have permission to take the defendant across the street for supper?

THE COURT: Yes. I do not think we will need him for the next half an hour or so.

MR. LEVINE: Could you show this to the Court?

Judge, I would like the record to reflect that there is red underlining and circling on the large copy of the exhibit Mr. Stelzer used. This was not underlined in any manner when he first used it, but apparently he was not merely pointing them out, but underlining certain things during his argument.

I would like the record to reflect that and have this copy--which is a mini-picture of State's Exhibit No. 1 on the advisory hearing--conform to what Mr. Stelzer has done. I would like it to conform.

MR. STELZER: Give me a piece of paper and I will start playing with it in red ink.

MR. LEVINE: Thank you, Mr. Stelzer.

[Thereupon, a recess was taken, and at 7:05 p.m., the jury returned to the courtroom and the following proceedings were had:]

THE COURT: I understand you folks have now arrived at a decision in this case.

Is that correct, Mr. Bonnet? Please give it to the clerk, so we can publish it.

Publish the verdict.

THE CLERK: [Reading] "Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. Case No. 78-17415. The State of Florida versus McArthur Breedlove, also known as McArthur Jenkins. Advisory sentence for the capital crime of first degree murder, as in Count 1 of the indictment: We, a majority of the jury, at Miami, Dade County, Florida, this 5th day of March, A.D., 1979, recommend that the Court impose the sentence of death, as authorized by Florida Statute 775.082, paragraph (1), so say the majority,

Robert L. Bonnet, foreman."

THE COURT: The clerk is going to ask you by name if you will confirm that that is the result of the majority of the jury.

You need not give your independent votes and you need not tell us what the vote was. Just simply say whether or not that verdict which has been read is in fact the result of the majority of the panel.

All right, go ahead.

[Thereupon, the clerk polled the jury, and in response to being asked, "Whether or not that verdict which has been read is in fact the result of the majority of the panel," each juror answered in the affirmative.]

THE CLERK: There is a majority vote, Your Honor.

THE COURT: Folks, you have been extremely patient with us.

This case has extended for some period of time. We worked you some hours that I apologized for and still do.

I am going to discharge you from further responsibilities on this case to the Court, with a couple of thoughts in passing.

We have very few opportunities to discharge civil responsibilities. Most of us do not bother to vote.

Jury service is a terribly important function, because it allows the community to get directly involved in the judicial system.

Sometimes we have people here quite willing to take pot shots at us, people who have never been involved, and it usually ends up being that the ones who make the most noise are on the outside. You have been honored by counsel, by being selected to serve as the judges of this case, and I know you have done your best to discharge those responsibilities consistent with the instructions that we had earlier given you.

I would like to suggest to you, please, that counsel on either side are not allowed to discuss this case with you. Nobody from their offices will touch base with you. Nobody will be involved with you or asking you for critiques of your decision or the manner in which it may have been arrived at; so, you need not be concerned about that.

In the old days, we used to not restrict lawyers concerning that, and a lot of us--I guess I was in that group--sometimes made jurors feel uncomfortable, because we asked them questions which they felt were challenging the integrity of their findings, so rules have been adopted which now make it so that without my consent and my supervision, nobody would be allowed to communicate with you.

I do not know whether or not any of you have been the subjects of interviews or not. I would suggest, if you have not, that you not allow yourself to be interviewed relative to your feelings about this case by anybody.

I will not tell you not to do that, because I do not think that is my function. You are at liberty to discuss this with your family and friends now, whatever you want to discuss concerning this case, as long as you are not approached or in contact with any of the attorneys or participants.

Decisions have to be arrived at by people, and some are ones that are easy; some are ones that are difficult.

I suggest to you that you will be better people for the work you have done in this case. I do not go to your decision at all, but simply the work you have accomplished in arriving at your decisions in this case, and I think all of you will be a lot better citizens as a result of it.

We are terribly busy. There is a tremendous amount of business that goes through this Court that cannot be accomplished without your participation.

Twelve judges handling every felony case filed in Dade County makes it like 1200 cases per year each Judge

is responsible for moving.

You can see why we are busy. We have to juggle our calendar with the needs and wants of lawyers because of their requirements, and of course, our jurors have been understanding. For that I am thankful.

I hope we will have a chance to work in the future. I trust all of you will use this experience for your own betterment.

I am going to excuse you at this time.

O.C. has some certificates which we would like to give you, but we will give it to you as you leave or as you get outside, and please be good enough to return to him the red badges, so we can provide them to the jury this week or in the future. God bless you. Thank you.

[Thereupon, the jury retired from the courtroom after which the following proceedings were had:]

THE COURT: As I had previously indicated to you, counsel, maximum time is provided for the purpose of filing such post-trial motions as you may deem appropriate.

Is there any lawful reason why sentencing should not take place at this time?

MR. ZENOBI: No.

THE COURT: Is there anything you would like to

provide to me in the way of evidence or testimony other than that which I have already heard, before sentence is pronounced, Mr. Zenobi?

MR. ZENOBI: I have none.

THE COURT: This cause came on before the Court on the original indictment filed by the Grand Jury, and after what I feel to be a quite fair and appropriate trial, Mr. Breedlove was convicted of the charge of first degree murder, among other things.

The jury was duly impaneled at that time, and of course, upon appropriate notice, hearing was held relative to the sentence that should be recommended by the jury to the Court; counsel, of course, being obviously aware that I am not bound by any recommendations made by the jury and I may make my own independent judgment based upon appropriate judicial findings.

I have been through, both independently and as the jury was listening to the evidence in this case, the aggravating and mitigating circumstances, and I find, as relates to the aggravating circumstances, that number one is not effective. I am not sure as to the date of his parole or whether or not Mr. Breedlove is in fact on parole, and it might have been an aggravating circumstance, had that information been introduced. It was not, and therefore is not an aggravating

circumstance.

As relates to item number two, Mr. Breedlove had been, and I so find, involved in at least two prior incidents, both of which are in the record and will be provided in the appropriate order that will be submitted to me to be signed.

Both of those crimes relating to assaults with intent to commit rape were in fact crimes of violence directed towards people, and would qualify as aggravating circumstances under subsection B.

As relates to subsection C, I do not find that there is an aggravating circumstance of knowingly creating a great risk of death to many persons. I do not think that the legislature intended that many persons would be two people.

Now, as relates to D, I find that is in fact an appropriate aggravating circumstance and so find that this murder was committed during the course of the burglary which took place in this case.

I do not find in E that the defendant did this for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. I have, in another case, determined that to be a different aggravating circumstance, and I am kind of inclined to agree with the findings of the Chief Justice, when he

alludes to that in the Washington versus State of Florida case, which has been affirmed by the Supreme Court, and that was just one of a number of aggravating circumstances, but I think his point is well taken, and I do not find that in this case.

I do find that F is an aggravating circumstance--that it was made for pecuniary gain, but in line with the authorities and the Supreme Court, find that should not be counted as a double. It is already part of a burglary; therefore, while I find it is an aggravating circumstance, it should not be used for the purpose of multiplying the other aggravating circumstances twice.

I do not find that as relates to subsection G, that it was done for the purpose of hindering or disrupting the lawful exercise of any governmental function.

I do find, under H, as an aggravating circumstance, that there was a high degree of pain involved, and that the conduct of this defendant, in the slashing out of the knife as he did, indicated to me an absolute, utter indifference to the suffering of others, and I do find that that aggravating circumstance is appropriate.

As relates to mitigating circumstances, I do not find A to be appropriate. There is no evidence

in this case that he does not have a significant history. As a matter of fact, the evidence is to the contrary--that he does have a significant history.

As relates to B, while I recognize that Mr. Breedlove does in fact have some emotional problems, I do not find that at the time of the occurrence of this incident--although there was a dispute between the doctors involved--that he was in fact suffering from an extreme mental or emotional disturbance; therefore, I find subsection B to be inappropriate.

As relates to C, it is obvious that the victim was not a participant or a consentual member of this crime, and therefore neither C nor D are appropriate.

I do not find in E that he was under any extreme duress or any substantial domination of any other person.

I find in F it is not an appropriate mitigating circumstance, because I do not feel, in any way, that his ability to substantially understand the law and to abide by the law has been impaired. As a matter of fact, I find that he knew well what he was doing; that he knew right from wrong; and was certainly able to have his conduct comport with the requirements of the law.

That being the discussion as relates to the

aggravating and mitigating circumstances in this case---

MR. STELZER: Judge, you forgot the "age."

THE COURT: I am sorry.

As relates to his age of 31 years--thank you, counsel--I think that is not a mitigating circumstance in this case at all and I do not find it as such.

The recommendation of this jury has been in this case, Mr. Breedlove, that you be sentenced to death. I find that the aggravating circumstances are in fact more than are necessary for the purpose of the imposition of the death penalty.

I find there are no mitigating circumstances which would in any way set aside the aggravating circumstances.

I adopt the recommendation that has been made by the jury in this case, and do, at this time, impose the sentence of death on you as relates to Count 1 in the indictment.

As relates to Count 3, which is the burglary, I impose a life sentence.

As relates to Count 4, which is the grand theft, I impose the sentence of five years, and I guess for our clerk's bookkeeping purposes, on the petit theft, Count 5, 60 days, all of which are credit for time

served; all of which are consecutive to that which has been imposed in Count 1 of this indictment.

That you have an automatic appeal to the Florida Supreme Court; that the Public Defender's office is appointed for that purpose.

The court reporter is instructed to forthwith proceed with the preparation of the transcript, so that your trial and the judgment entered by this Court and the sentence imposed by this Court may be promptly reviewed by that body.

Is there anything else to be brought before the Court?

MR. STELZER: I believe you must make a finding pursuant to Gardners vs. Florida.

THE COURT: Thank you. I have not considered any matters other than that which has been brought before me by counsel in this case.

There have been no other matters which have come to my attention, no other matters I have considered, other than those which counsel are well aware of, and who in fact brought it to my attention.

We will stand at ease until 9:00 tomorrow morning.

[Thereupon, the trial was concluded.]

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CERTIFICATE

STATE OF FLORIDA:

COUNTY OF DADE :

I, PAUL SCHLOSS, do hereby certify that the case of The State of Florida versus McArthur Breedlove, pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Case No. 78-17415, came on for Motion to Suppress, Trial and Penalty Hearing, on February 26, 27, 28, 1979 and March 1, 2, and 5, 1979, before The Honorable Richard S. Fuller, Judge; that I was authorized to and did report in shorthand the proceedings in said case; and that the foregoing pages, numbered 1 to and including 1452 constitute a true and correct transcription of my shorthand report of the proceedings of said case.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of April, 1979.

Paul Schloss

IN THE SUPREME COURT OF FLORIDA

CASE NO. 56,811

MACARTHUR BREEDLOVE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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POINTS ON APPEAL

I

THE SUPPRESSION BY THE PROSECUTION OF FAVORABLE EVIDENCE INCLUDED IN AN UNDISCLOSED POLICE REPORT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE REFUSAL OF THE TRIAL COURT TO ORDER PRODUCTION OF ALL POLICE REPORTS WHICH INCLUDED STATEMENTS OF WITNESSES LISTED BY THE PROSECUTION DENIED DEFENDANT THE RIGHTS VOUCHSAFED BY RULE 3.220(a) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE AND HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, ENTITLING DEFENDANT TO A NEW TRIAL.

II

THE TRIAL COURT ERRED IN DENYING A MOTION TO SUPPRESS STATEMENTS OBTAINED FROM DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III

THE ADMISSION INTO EVIDENCE OF PREJUDICIAL HEARSAY STATEMENTS DENIED DEFENDANT HIS RIGHT TO CONFRONTATION AND DEPRIVED HIM OF A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THE TRIAL COURT THEREFORE ERRED IN ADMITTING THE HEARSAY INTO EVIDENCE, AND IN DENYING MOTIONS FOR MISTRIAL BASED UPON ITS INTRODUCTION AND UPON THE PREJUDICIAL COMMENTS THEREON DURING THE CLOSING ARGUMENT OF THE PROSECUTOR.

IV

THE DELIBERATE MISCONDUCT OF THE PROSECUTOR IN CLOSING ARGUMENT DENIED DEFENDANT A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

V

THE CONVICTION AND SENTENCE IMPOSED UPON DEFENDANT FOR THE OFFENSE OF BURGLARY IS INVALID UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

VI

THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES (1977) TO DEFENDANT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE FACTS

Count I of the indictment alleges that the homicide in this case was committed "from a premeditated design. . . or while [defendant] was engaged in the perpetration of, or in an attempt to perpetrate" a burglary (R. 1). At trial, the State proceeded solely on the latter theory, and abandoned any contention that defendant was guilty of premeditated first-degree murder (Tr. 466, 532-33, 1158-59, 1199). The only issue at trial was identity; the only direct evidence which inculpated defendant was a post-arrest statement (Tr. 1121-1202, 1207-23, R. 130-35).

The incident which gave rise to the charges in this case occurred during the early morning hours of November 6, 1978 at a house located at 1315 Northeast 146th Street in Miami (Tr. 716, 726-731). The only eyewitness to the events inside of the house was Carol Meoni, who was then residing there with the victim, Frank Budnick (Tr. 716-18). Meoni did not observe the actual as-

sault upon Budnick; she awakened as Budnick was leaving their bedroom after having been wounded (Tr. 726-27).

Meoni was unable to identify the assailant; she testified that she had only observed "this, like, shadow or something going out of the door" before Budnick left the bedroom (Tr. 726).[2] She testified that she had followed Budnick out of the house (Tr. 726-28). As she left, she observed a knife in the doorway of the house; she subsequently observed Budnick lying on the ground near the street (Tr. 727).[3]

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[2] A neighbor, Joan Fournier, testified that she had been awakened by noise from the Meoni residence during the early hours of November 6th, and that she had observed a man riding a bicycle on 146th Street (Tr. 590-93). She could not identify this individual or give any description of him except that he was "maybe five foot ten, and he looked husky, about 190, but I am not sure about that." (Tr. 593).

Fournier testified that, as she observed this individual, "[t]h color blue stuck in my mind", but that she was not sure "if it was from the bicycle or from the clothing." (Tr. 594). She stated that she had observed the person on the bicycle stop, look back in the direction of her home, and proceed away (Tr. 594).

[3] The medical examiner who performed the autopsy on Budnick, Dr. Stanton Kessler, testified that the cause of death was a stab wound to the chest, which penetrated through the collarbone and pierced one of the lungs (Tr. 766, 769). He testified that he had also observed "defense wounds" on the right hand of the victim, which were consistent with Budnick having attempted to seize the knife from his assailant (Tr. 772-73). Dr. Kessler, who went to the house on the night of the incident, also took photographs of Meoni, which showed wounds to her head and "defense wounds" on her hands (Tr. 762-65). Meoni testified that she had been awakened by "a severe pain in the side" of her head, and subsequently realized that she had suffered a wound above her eye (Tr. 726, 731).

The injuries to Meoni formed the basis for Count II of the indictment, which charged defendant with attempted murder in the firs degree (R. 1-2). The jury acquitted defendant on that charge (R. 1

Although Dr. Kessler was the medical examiner who performed the autopsy, the State presented the testimony of another medical examiner, Dr. Ronald Keith Wright, at the penalty phase; objections t

(continued on next page)

Police officers were subsequently summoned to the scene; the first officers arrived at approximately 3:00 A.M. (Tr. 611-12). The knife and other physical evidence were recovered from the house, and numerous latent fingerprints, none of which were introduced into evidence, were taken (Tr. 632-33, 642, 669, 675-77, 678-91).[4] The officers also observed scratches on the lock plates of the utility room door of the house (Tr. 675-78), and found a purse belonging to Meoni on the ground in the back yard (Tr. 615, 672-73).

The two Public Safety Department detectives assigned to investigate the case, Julio Ojeda and Charles Zatrepalek, commenced their investigation on the morning of November 6, 1978 (Tr. 873-77, 1007). They initially directed that investigation toward finding the bicycle on which a witness had seen an individual leave the area of the Meoni residence (Tr. 877-81, 1008).[5]

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3 cont.
his testimony were overruled (Tr. 1312-13). For further facts regarding the testimony of Dr. Wright at the penalty phase, see Point VI(B), infra.

4 A fingerprint examiner employed by the Dade County Public Safety Department, George Hertel, testified that he compared five o the latent fingerprints with standard fingerprints of defendant, an that none matched (Tr. 844-45). On direct examination, Mr. Hertel testified that some individuals do not perspire sufficiently to leave latent fingerprints and that he had observed defendant when taking a set of standard fingerprints; he stated that defendant did not appear to perspire excessively (Tr. 847-48). However, he admitted on cross-examination that the degree to which an individual will perspire is affected by such factors as temperature, the type of food that the individual has eaten, and stress (Tr. 850-53). He asmitted that he had not taken these factors into account in the answers which he had given on direct examination (Tr. 853-54).

5 See n. 2, supra. During their investigation, the officers learned that a bicycle had been taken from a house located near
(continued on next page)

Defendant was stopped by North Miami Beach police officers on the night of November 8, 1978, and was subsequently arrested on charges of obstruction of an officer by a disguised person and loitering (Tr. 45-47, 67-81, 797-804). The blue bicycle was subsequently discovered at the home of defendant (Tr. 813, 890-93, 1010-11). The officers also spoke with the mother of defendant, Mary Gibson, and with his brother, Elijah Gibson (Tr. 908-09, 1012).[6] Based upon the information obtained from the Gibsons and the discovery of the bicycle, the officers decided to interrogate defendant, who was then incarcerated in the Dade County Jail (Tr. 961-62, 971-72, 1010, 1065-66).[7]

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5 cont.
the Meoni residence (Tr. 877-78). The young girl who owned the bicycle, Debbie Layton, testified that her brother had borrowed it on the night of November 5th, and that he had left it leaning against the side of their house upon his return, at approximately 10:00 P.M. (Tr. 786). The bicycle was not there on the following morning, November 6th (Tr. 787, 828). Ms. Layton described the bicycle as a blue ten-speed (Tr. 785).

6 Neither Mary nor Elijah Gibson testified at trial. Rather, their statements, which circumstantially inculpated defendant, were introduced through the testimony of Detective Ojeda; objections on the ground that their statements were inadmissible hearsay were overruled, the court ruling that the statements were not being introduced for their truth (Tr. 923-37).

In closing argument, the prosecutor stated to the jury that the Gibsons "told the truth" to the officers, and that the jury should "not have any doubt whatsoever about what" they had said (Tr. 1186, 1188). Objections to this argument were overruled, and a motion for mistrial based thereon was denied (Tr. 1186-88, 12-3-06)

For additional facts regarding the admission into evidence of the statements of Mary and Elijah Gibson, see Point III, infra. For additional facts regarding the closing argument of the prosecutor, see Point IV, infra.

7 Prior to trial, defendant moved to suppress the statements which the officers subsequently obtained from him on November 9th, and (continued on next page)

During the interrogation, defendant denied involvement in the offenses (Tr. 921-40).[8] At the conclusion of the statement, defendant was placed under arrest for the homicide in

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7 cont.
during a second interrogation on November 21, 1978 (R. 69-70). Defendant testified at the hearing on the motion that he had been physically abused by the interrogating officers on November 9th, and had waived his Fifth Amendment rights due to the abuse (Tr. 309 321-23). Detective Zatrepalek denied having beaten defendant (Tr. 348).

Defendant also testified that, on November 21st, he had told the officers who brought him from the Dade County Jail to the police station for interrogation that he did not want to be questioned (Tr. 312). This was based upon the advice of his appointed counsel, who had interviewed him subsequent to his arrest on November 9th, and advised him not to make any statements in the absence of an attorney (Tr. 285-88, 295). Defendant testified that his refusal to be questioned was heard by the corrections officer who brought him from his cell (Tr. 312); this testimony was corroborated by the corrections officer (Tr. 273-77, 300-02, R. 89-91).

The crux of the defense at trial was that the State had introduced no independent evidence of the guilt of defendant -- that its case was based solely upon the statements of defendant -- and that those statements were involuntary (Tr. 1123-40, 1143-54, 1210-16). For additional facts regarding the admissibility of the statements obtained from defendant, see Point II, infra.

8 However, defendant, in the absence of Detective Zatrepalek, made certain statements which Detective Ojeda deemed significant (Tr. 988). Specifically, Ojeda testified that defendant, on two occasions when Zatrepalek was out of the interrogation room, stated that he had in fact taken the blue bicycle "'two doors down from the murder'" and that no fingerprints would be found inside the house because he "'was not in that house'" or because he had been wearing socks on his hands (Tr. 938, 940-42). Additionally, defendant told the officers that he had had blood on his trousers that night when he had returned to his home (as stated by his brother Elijah, see n. 6, supra), but that it was the product of a fight in which he had been involved; Ojeda testified that defendant, during the course of an accusation that he was being "'frame[d]'", stated: "'I suppose the blood on my pants, you are going to say, comes from the man inside the house?'" (Tr. 939-40). Ojeda testified that this admission was deemed significant because neither he nor Zatrepalek had informed defendant of the sex of the victim (Tr. 941).

this case (Tr. 943-44). Subsequently, on November 21, 1978, defendant made both an oral and a formal statement to Zatrepalek, in which he admitted having committed the burglary and having assaulted the victim (Tr. 1030, R. 130-34).[9]

The jury returned guilty verdicts on the murder charge, the burglary charge, and the theft charges, but found defendant not guilty on the attempted murder charge (R. 154-58). At the advisory sentencing hearing, the prosecution presented: a sergeant from the Los Angeles Police Department, who testified regarding two sexual assaults for which defendant had previously been convicted; Dr. Ronald Wright, who testified regarding the pain suffered by the victim prior to his death; and two psychiatrists, who had been appointed by the court prior to trial to determine the competency of defendant (Tr. 1291-1302).[10] Defendant introduced the testimony of a psychiatrist and two psycholo-

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[9] Defendant made no admissions regarding the alleged assault upon Meoni (Tr. 1030, R. 130-34). He described the assault upon Budnick as follows:

> Q. What happened when you entered the bedroom?
>
> A. Well, I started going through a box -- jewelry box, the dresser drawers, and I made some noise, and the guy woke up and grabbed [me] by the shirt, and I swung back with the knife, and I ran.
>
> * * *
>
> A. I jumped, panicked. He just grabbed my shirt. I swung back with the knife, like that, and then he turned loose of my shirt and I ran. (R. 133-34).

[10] For additional facts regarding the evidence introduced by the State during the penalty phase, see Point VI(B), infra.

gists, who testified that defendant suffers from paranoid schizophrenia, has impaired judgment and, under stress, is unable to conform to the requirements of the law (Tr. 1324-73).[11]

The jury returned an advisory verdict recommending the imposition of the death penalty (R. 178). The trial court then orally imposed sentence (Tr. 1477-81); it subsequently entered a formal sentencing order (R. 183-90).[12]

ARGUMENT

I

THE SUPPRESSION BY THE PROSECUTION OF FAVORABLE EVIDENCE INCLUDED IN AN UNDISCLOSED POLICE REPORT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE REFUSAL OF THE TRIAL COURT TO ORDER PRODUCTION OF ALL POLICE REPORTS WHICH INCLUDED STATEMENTS OF WITNESSES LISTED BY THE PROSECUTION DENIED DEFENDANT THE RIGHTS VOUCHSAFED BY RULE 3.220 (a) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE AND HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, ENTITLING DEFENDANT TO A NEW TRIAL.

Defendant invoked the reciprocal provisions of Rule 3.220 of the Florida Rules of Criminal Procedure at arraignment (R. 5).[13]

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[11] For additional facts regarding the testimony introduced by defendant at the penalty phase, see Point VI, infra.

[12] For additional facts regarding the penalty phase and the findings of the trial court, see Point VI, infra.

[13] Discovery was invoked orally, pursuant to the then-existing provisions of Local Rule 4 of the Local Rules of the Circuit Court of the Eleventh Judicial Circuit of Florida, which permitted oral invocation of Rule 3.220 (R. 5).

Fifth Amendment rights was accordingly invalid, and the statement obtained from him was inadmissible. Michigan v. Mosley, supra; Cribbs v. State, supra; Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977).

III

THE ADMISSION INTO EVIDENCE OF PREJUDICIAL HEARSAY STATEMENTS DENIED DEFENDANT HIS RIGHT TO CONFRONTATION AND DEPRIVED HIM OF A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THE TRIAL COURT THEREFORE ERRED IN ADMITTING THE HEARSAY INTO EVIDENCE, AND IN DENYING MOTIONS FOR MISTRIAL BASED UPON ITS INTRODUCTION AND UPON THE PREJUDICIAL COMMENTS THEREON DURING THE CLOSING ARGUMENT OF THE PROSECUTOR.

The mother of defendant, Mary Gibson, and his brother, Elijah Gibson, were questioned by police officers at their home on November 9, 1978, and subsequently gave formal statements at the Public Safety Department (Tr. 908-09, 1012-14). The Gibsons did not testify at trial. However, the substance of their statements was introduced through the testimony of one of the investigating officers, Detective Ojeda (Tr. 923-37).

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22 cont.

> to an inference that the person in custody may then wish to speak for reasons unrelated to the conduct or strategy of his inquisitions, there is no conflict between the exercise of the right to remain silent and the resumption of questioning. United States v. Mearns, 443 F.Supp. 1244, 1253 (D. Del. 1978).

Thus, this Court has held that when an accused, several days after having invoked the Fifth Amendment, "indicated a desire to confess", questioning was properly resumed. Witt v. State, 342 So.2d 497, 499-500 (Fla. 1977). No such "desire to confess" prompted the resumed interrogation in this case.

The mechanism employed by the prosecutor to bring the statements of the Gibsons before the jury was the introduction of the oral statement of defendant, given at the police station on November 9th. Defendant continued to deny his involvement in the offenses in this case throughout the interrogation on that date (Tr. 921-32, 937-42). Ojeda testified that he had, during the course of the interrogation, "confronted" defendant with statements of the Gibsons which circumstantially implicated him in the homicide in this case (Tr. 923-37). The trial court permitted the prosecutor to elicit these statements before the jury (Tr. 923-37, 938-41).[23]

Although the prosecutor never advanced this as a basis for allowing the statements into evidence, the court ruled that the statements were not being introduced for the "truth of the matter to be asserted" but to show "what the defendant heard during the course" of the interrogation (Tr. 933).[24] In this guise, the prosecutor was allowed to elicit the following statements of the Gibsons: that defendant had had a blue bicycle on the morning of November 6th; that defendant had had blood on his

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[23] Counsel for defendant repeatedly objected to the introduction of these statements on hearsay and confrontation grounds; after the objections were overruled, counsel moved for a mistrial (Tr. 923-24, 927-32, 934). The motion was denied (Tr. 934).

[24] That the prosecutor had very different intentions is shown by his closing argument to the jury, in which he argued that the statements were true (Tr. 1185-88). It is also shown by his subsequent attempt to actually bring before the jury the sworn statements given by the Gibsons (Tr. 1014-16).

trousers when he returned home; and that defendant had been in possession of a watch when he returned home on November 6th (Tr. 923-24, 927-31, 937, 939-41).[25] These statements were of very significant weight in the prosecution case -- they constituted the only evidence which, independent of statements of defendant, incriminated him. Defendant submits that this testimony was, contrary to the ruling of the trial court, inadmissible hearsay, and, even if it was not, the manner in which was introduced and utilized by the prosecution denied defendant his right to confront the witnesses against him and deprived him of a fair trial.

A. The Statements Of The Mother And Brother Of Defendant Constituted Inadmissible Hearsay.

The common-law hearsay rule forbids the introduction into evidence of "statements made by third persons not produced as witnesses". Halfrich v. State, 122 Fla. 375, 165 So. 285, 287

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[25] As counsel for defendant pointed out to the trial court, the testimony regarding the watch was particularly prejudicial (Tr. 933-34). Elijah Gibson, according to Ojeda, had stated that defendant had been in possession of "a watch with rhinestones around the face." (Tr. 932). Carol Meoni, who had been living in her home with the victim, testified that such a watch had been discovered missing after the homicide (Tr. 933-34).

The State introduced no physical evidence whatsoever to link defendant to the homicide. As counsel stated, the statement of Elijah "provides a direct link to the scene" (Tr. 133), a link which defendant could not cross-examine.

Defendant, in response to having been confronted with this statement, denied it, as he had previously denied virtually every statement of the Gibsons (Tr. 923-32, 937). Indeed, one of the officers, Detective Zatrepalek, testified that defendant did not admit the truth of any statements made by his brother (Tr. 1073).

(1936)(citation omitted).[26] "The hearsay rule is directed at out-of-court statements made to a witness by another person as to personal observations made by such other person." United States v. Pickle, 424 F.2d 528, 529 (5th Cir. 1970). See also Baker v. State, 336 So.2d 364, 367 (Fla. 1976); Matthews v. State, 130 Fla. 53, 177 So. 321, 323-24 (1937). Hearsay is incompetent as evidence in a criminal trial. Smart v. State, 274 So.2d 577, 579 (Fla. 2d DCA 1973). See also Briklod v. State, 365 So.2d 1023 (Fla. 1978).

Out-of-court delcarations by a third party are not hearsay only "when the inquiry is not as to the truth of the words spoken, but merely whether they were in fact spoken." Williams v. State, 338 So.2d 251 (Fla. 2d DCA 1976)(citation omitted). Such statements are "verbal acts", and a witness may "testify to the fact that an out-of-court conversation occurred rather than to the truth of matters asserted therein." United States v. Alvarez, 584 F.2d 694, 697 (5th Cir. 1978)(citations omitted). But "verbal acts" are only non-hearsay when the prosecution is not contending that the statements are true. Anderson v. United States, 417 U.S. 211, 220 (1974).

The statements of the Gibsons were hearsay. Generally, "the statement of a third person, who was not present at trial,

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[26] The trial in this case commenced on March 1, 1979, prior to the effective date of the Evidence Code. See In re Florida Evidence Code, 376 So.2d 1161 (Fla. 1979); Ch. 78-379, § 1, Laws of Florida. Section 90.801(1)(c), Florida Statutes (1979), the relevant section of the now-applicable code, codifies the common-law definition of hearsay.

allegedly made to the police officer during his investigation of the crime" is inadmissible hearsay. Dykman v. State, 300 So.2d 695, 699 (Fla. 3d DCA 1974), cert. denied 419 U.S. 1105 (1975). The only possible non-hearsay basis for the introduction of the statements was that suggested by the trial court (although not by the prosecution) -- to show the jury why defendant made a statement to the officers (Tr. 934).

"Verbal acts" which in fact produce a confession are admissible as non-hearsay. See Brown v. State, 367 So.2d 616, 624 (Fla. 1979); McCumber v. State, 182 So.2d 627, 628 (Fla. 3d DCA 1966).[27] However, the facts of such statements are not admissible; "[a]n officer may say what he did pursuant to information but he may not relate the information itself for such is hearsay." Collins v. State, 65 So.2d 61, 67 (Fla. 1953) (citation omitted).

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[27] This was not precisely the ruling of the court; the court went far beyond the parameters of this principle in allowing the Gibson statements into evidence:

> The Court: What was the basis of your side bar, please, Mr. Zenobi [counsel for defendant]?
>
> Mr. Zenobi: First of all, the basis is that not only is everything he has been testifying to hearsay, but also, all of these witnesses are available. They are on the State's witness list.
>
> Secondly, the fact that even if the Court considers them not to be hearsay, when he was confronted with these statements, he denied them and nothing further was done with some of them.
>
> The Court: I know. (Tr. 932).

The court then stated that the jury would nonetheless be allowed to hear "what the defendant heard during the course of these conversations" (Tr. 933). Thus, although the court fully recognized that the majority of the out-of-court statements did not produce admissions from defendant, it allowed the statements into evidence.

Despite the suggestion by the court that the Gibson statements were admissible as non-hearsay under the above rule, the record clearly reflects, one of the interrogating officers testified, and the court itself admitted that defendant had denied the most incriminating of these statements, and that the statements, by and large, did not produce admissions from defendant (Tr. 923-32, 937, 1073).[28] Thus, despite the non-hearsay theory advanced by the court, these statements were plainly inadmissible hearsay. Collins v. State, supra at 66-67; Lee v. State, 328 So.2d 266 (Fla. 1st DCA 1976). See also

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[28] The only matters which defendant admitted after having been "confronted" with the Gibson statements were that he had had a bicycle on November 6th, that he had been wearing long trousers when he had left his house, and that he had been wearing "cut-offs" when he returned (Tr. 925, 929). And defendant offered exculpatory statements in response -- not admissions of guilt (Tr. 929-30). Furthermore, the most critical aspect of the Gibson statements -- that defendant had had a watch when he returned home -- was repeatedly denied by defendant (Tr. 931-32, 937, 940-41).

This Court considered a very different situation in Brown v. State, supra; in that case, a co-defendant was asked, in the presence of defendant, if defendant had been involved in a homicide -- the co-defendant replied in the affirmative, and the defendant immediately confessed. 367 So.2d at 618. This Court held:

> . . . The principal issue at trial was the reliability of Brown's confession. The jolting effect produced by Simmons' [the co-defendant] accusation was the single circumstance explaining Brown's decision to confess, both negating inferences that Brown's confession resulted from police pressure and affirmatively suggesting that Brown confessed because his previous story would no longer be credited. The testimony as to the Brown-Simmons confrontation described a critical and plainly relevant operative fact, not hearsay. The testimony was therefore, admissible. 367 So.2d at 624 (footnote omitted).

That this case is not Brown could not be more apparent -- the Gibson statements hardly had a "jolting effect" on defendant. Unlike Brown, the statements in this case simply did not explain a "decision to confess".

United States v. Johnson, 439 F.2d 885 (5th Cir. 1971), cert. denied 404 U.S. 880 (1971). The record clearly reflects the true intentions of the prosecution and the law clearly establishes the invalidity of the premise upon which the trial court admitted this testimony.

B. The Introduction Of The Statements Of The Mother And Brother Of Defendant Violated The Confrontation Clause Of The Sixth Amendment.

"[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." Pointer v. Texas, 380 U.S. 400, 406-7 (1965)(citations omitted). The purpose of this function of the Sixth Amendment is "to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." Berger v. California, 393 U.S. 314, 315 (1969) (citation omitted). Although an "adquate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation", Douglas v. Alabama, 380 U.S. 415, 418 (1965), the Confrontation Clause contemplates that, absent compelling reasons to the contrary, "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. State of Louisiana, 379 U.S. 466, 472-73 (1965).

The issue presented in this case stands at the crossroads of the common-law hearsay rule and the Confrontation Clause. Al-

though both the clause and the rule "stem from the same roots", Dutton v. Evans, 400 U.S. 74, 86 (1970)(footnote omitted), "it is quite a different thing to suggest that the overlap is complete." California v. Green, 399 U.S. 149, 155 (1970). Rather, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" Dutton v. Evans, supra at 89 (citation omitted). Thus, regardless of whether a third-party statement is admissible under the hearsay rule, the Confrontation Clause requires a separate inquiry to determine its admissibility; if the statement reflects sufficient "indicia of reliability", its introduction may be permissible under the Clause, even absent physical confrontation of the witness. Dutton v. Evans, supra at 89-90; California v. Green, 399 U.S. 149, 161-64 (1970); Hoover v. Beto, 467 F.2d 516, 533 (5th Cir. 1972), cert. denied 409 U.S. 1086 (1972).[29]

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[29] This is not to say that merely because a third-party statement is admissible as a hearsay exception, the Confrontation Clause is per se satisfied.

> . . . Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true; merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. California v. Green, supra at 155-56 (citations and footnote omitted).

Accord Dutton v. Evans, supra at 81-82.

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But the Clause requires more than that the third-party statement reflect the "indicia of reliability" mandated by Dutton. It reflects a "predicate of unavailability" of the witness before such statements are admissible. Mancusi v. Stubbs, 408 U.S. 204, 212 (1972). The prosecution must first demonstrate that the declarant is unavailable before the focus shifts to the reliability of the proffered statement. See Barber v. Page, 390 U.S. 719 (1968); Phillips v. Wyrick, 558 F.2d 489, 493-94 (8th Cir. 1977), cert. denied ___U.S.___, 98 S.Ct. 1283 (1978); United States v. Scholle, 553 F.2d 1109, 1119 (8th Cir. 1977), cert. denied ___U.S.___, 98 S.Ct. 432 (1977); Stewart v. Cowan, 528 F.2d 79, 84-85 (6th Cir. 1976); Park v. Huff, 506 F.2d 849, 858 (5th Cir. 1975), cert. denied 423 U.S. 824 (1975); United States v. Burke, 495 F.2d 1226, 1232-33 (5th Cir. 1974), cert. denied 419 U.S. 1079 (1974).[30]

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29 cont.
Thus, in light of Dutton and Green, "there can no longer be any doubt that, despite the fact that an extrajudicial statement may satisfy the requirements of a recognized exception to the hearsay rule, the introduction of such a statement may in certain circumstances be barred" by the Confrontation Clause. United States v. Oates, 560 F.2d 45, 81 (2d Cir. 1977).

> . . . [T]estimony which might hurdle the hearsay rule via an exception can still run afoul of the Sixth Amendment. Simply pigeonholing evidence into a recognized exception is insufficient to show compliance with the confrontation clause. United States v. Roberts, 583 F.2d 1173, 1176 (10th Cir. 1978)(citations omitted).

30 Indeed, "[t]he primary consideration in this analysis is the extent to which the declarant is available to testify and be subject to cross-examination." United States v. Rogers, 549 F.2d 490, (continued on next page)

This requirement was not satisfied in this case, and the introduction of the Gibson statements through the testimony of the officer consequently violated the Sixth Amendment. The State made no showing whatsoever of the unavailability of the Gibsons; indeed, in closing argument, the prosecutor stated to the jury that he could have produced them (Tr. 1184-86).[31]

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30 cont.
500 (8th Cir. 1976), cert. denied 431 U.S. 918 (1977). The basis for this is obvious -- the values protected by the Confrontation Clause are of supreme constitutional importance, and "[a]ny exception should be narrow in scope and based on necessity or waiver." United States v. Benefield, 593 F.2d 815, 821 (8th Cir. 1979). Thus, "the Constitution imposes on the prosecution the burden of showing the unavailability of a witness before it may seek to introduce less reliable accounts of his statements in a criminal trial." Stewart v. Cowan, supra at 84 (footnote omitted).

31 The prosecutor stated that the reason for not doing so was benevolent:

> He [counsel for defendant] asked questions about those statements, and that is proper. That is a fair issue for him to raise, and then he said, "Why didn't the State produce them as witnesses?"
>
> I am going to answer both of those questions for you right now. The State Attorney's office is not in the business, ladies and gentlemen, of compelling a mother to come in and testify against her son, and in a first degree murder case, when we are seeking the death penalty. We are not in the business of doing that, if we can avoid it. We are not in the business of compelling a brother to testify against his own brother in a first degree murder case, where we are seeking the death penalty. (Tr. 1185).

Of course, the prosecutor went on to argue that the Gibson statements were in fact true (Tr. 1186-88), thereby garnering a dual advantage from not producing the witnesses -- bringing their testimony before the jury without challenge, and appearing magnanimous as a result.

This feigned benevolence is in direct violation of the clear duty of the State to produce available witnesses whose statements are introduced through the testimony of other witnesses:

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The failure of the State to produce the Gibsons, or, in the alternative, to demonstrate that they were unavailable, rendered the introduction of their testimony violative of the Confrontation Clause. Barber v. Page, 390 U.S. 719 (1968); Harris v. Spears, 606 F.2d 639 (5th Cir. 1979).[32]

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31 cont.

> . . . It seems to us, however, that where an extrajudicial declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant. Mere availability, in the sense that defendant could have subpoenaed him, does not in our opinion, suffice. Simmons v. United States, 440 F.2d 890, 891 (7th Cir. 1971).

32 In Barber, a co-defendant made a statement at preliminary hearing which inculpated the accused. Counsel for the accused did not cross-examine him. 390 U.S. at 720. Thereafter, at trial, the State sought to introduce the transcript of the statement in lieu of the testimony of the co-defendant "on the ground that Woods [the co-defendant] was unavailable to testify because he was outside the jurisdiction"; Woods was at that time incarcerated in federal prison in another state. Id.

The trial court permitted the introduction of the transcript over an objection on confrontation grounds. Id. The Supreme Court held this procedure violative of the Confrontation Clause.

The Court first stressed that exceptions to physical confrontation are grounded, in the first instance, upon availability:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes of the confrontation requirement. 390 U.S. at 722 (citations omitted).

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C. The Introduction Of The Statements Of The Mother And Brother Of Defendant Constitute Reversible Error.

When inadmissible hearsay is introduced, "if it is relevant, material and prejudicial then a conviction based thereon will, upon timely appeal, be reversed." Horn v. State, 298 So.2d 194,

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32 cont.

The Court then, proceeding on the assumption that the accused "made a valid waiver of his right to cross-examine Woods at the preliminary hearing", commenced its analysis "with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma." Id. at 722, 723. Noting that various interstate compacts now allow for rather free transfers of prisoners from one jurisdiction to another, the Court gave great weight to the fact that "the state authorities in this case made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence". Id. at 724.

The Court reached the following conclusion:

> . . . In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly. 390 U.S. at 724-25.

Thus, in Barber, the fact that the accused had had an opportunity to cross-examine the absent declarant prior to trial and the fact that the declarant was incarcerated in an out-of-state prison were not of significance -- what was of significance was that the State did not even attempt to secure the presence of the witness. In this case, of course, there was no opportunity to cross-examine the Gibsons at the time that they made their statements to the police, and no such apparently insuperable barriers to the production of the witnesses. If the co-defendant in Barber was "available" for the purposes of the Confrontation Clause, the Gibsons were far more so; if the "availability" of the witness in Barber rendered the introduction of his testimony violative of the Confrontation Clause, the availability of the Gibsons renders the introduction of their testimony equally, if not more, violative of that constitutional imperative.

201 (Fla. 1st DCA 1974). Accord Collins v. State, 65 So.2d 61, 66-67 (Fla. 1953). That the testimony in this case satisfies this test is obvious -- it established significant circumstantial links between defendant and the scene of the crime, including the only physical evidence which tied defendant to the offenses charged (Tr. 923-37, 939). It was also the only evidence introduced at trial which validated the inculpatory statements of defendant; those statements were attacked, both prior to and during trial, as the product of coercion, and the inadmissible hearsay statements of the Gibsons absolutely devastated that challenge.[33]

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[33] During one of the sidebar conferences on the admissibility of this testimony, the court stated that it would instruct the jury not to consider the Gibson statements for the truth of the matters asserted therein (Tr. 933). It subsequently gave the following instruction:

> I have admitted that evidence in this case, and you should understand that as to the officers' testimony about statements made to him by somebody else, you are not to accept the statements that somebody else told the officer as the truth of that issue at all.
>
> It is simply to give you the opportunity to evaluate, for the purposes of your decision, what this officer may have told the defendant at the time their conversation took place. (Tr. 936).

The efficacy of such an instruction is highly doubtful:

> . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. Briklod v. State, 365 So.2d 1023, 1026 (Fla. 1978), citing Krulewitch v. United States, 336 U.S. 440, 453 (1949)(Jackson, J. concurring)(citations omitted).

"A judge's corrective statement will rarely completely cure the prejudicial damage created when improper information reaches the ears of the jury." United States v. Semesohn, 421 F.2d 1206, 1208 (2d Cir. 1970). And such instructions "are impotent to overcome

But reversal in this case need not be predicated upon the introduction of the evidence alone. For the prosecutor, after allowing the trial court to admit the Gibson statements as ostensible non-hearsay, proceeded in his closing argument to vigorously claim that the statements were true and should be considered as substantive evidence:

> They gave their statements back on November the 9th. At that time, Mr. Breedlove was being interviewed by Ojeda and Zatrepalek. They gave their statements to another detective.
>
> They did not know he was being charged at that point with first degree murder. They told the truth at that point. (Tr. 1186).
>
> * * *
>
> Do not have any doubt whatsoever about what Mary Gibson and what Elijah Gibson told the police. . . (Tr. 1188).

Objections to this argument were overruled by the trial court and a subsequent motion for mistrial was denied (Tr. 1186-88,

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33 cont.
those situations in which there is great risk that the jury will not or cannot abide by the judge's instructions to the detriment of the defendant's vital interests." United States v. Levinson, 405 F.2d 971, 988 (6th Cir. 1968), cert. denied 295 U.S. 906, 958 (1969):

Where, as here, improper evidence is heard by the jury, a reviewing court must be "entirely satisfied that the instruction of the trial court to disregard such evidence completely removed its evil effect" to uphold a conviction. Hartman v. State, 121 Fla. 627, 164 So. 354, 355 (1935). See also Wilson v. State, 134 Fla. 199, 183 So. 748, 752 (1938); Seidel v. State, 240 So.2d 521, 523 (Fla. 4th DCA 1970). The vague and confusing instruction given by the trial court in this case cannot possibly pass muster under this standard; rather, "[t]he judge's words were here at most a mild antiseptic with no prognostic or retrospective assurance that they eliminated the sepsis." Odom v. United States, 377 F.2d 853, 859 (5th Cir. 1967).

1203-04, 1206).[34]

Assuming that the testimony was properly admitted as non-hearsay, the prosecutor was not entitled to rely upon it for its truth. See Moore v. United States, 429 U.S. 20 (1976); Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976); Smith v. State, 314 So.2d 226, 229 (Fla. 4th DCA 1975). Thus, his argument, "which assumed the truth" of the Gibson statements, "went beyond the issue of voluntariness and constituted an improper use of the testimony." Brown v. State, 367 So.2d 616, 624 (Fla. 1979). Indeed, the improper argument alone requires reversal. McCall v. State, 120 Fla. 707, 163 So. 38, 44-47 (1935).[35] More-

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[34] This argument, combined with the trial court, in the presence of the jury, overruling the objections of counsel for defendant to the comments regarding the truth of the Gibson statements, obviously diluted whatever possible beneficial effect might have inured from the earlier instruction of the court. See n. 33, supra.

[35] As discussed previously, see n. 28 supra, the Brown decision involved a true non-hearsay declaration, which was admissible to show the jury why the accused confessed. The prosecutor in that case, as did the prosecutor in this case, argued that the alleged non-hearsay was in fact true, and this Court held it improper. 367 So.2d at 624. However, this Court held in Brown that the error, which also involved references to the silence of the accused, was not reversible because the entire subject matter of the argument had first been injected into the trial by counsel for the accused. 367 So.2d at 625.

This case is not Brown, either factually or legally, and a different conclusion is required. As the record reflects, it was the prosecution which first brought the hearsay statements to light, and counsel for defendant vigorously objected from the outset (Tr. 923-37). And, after the statements had been brought before the jury, counsel for defendant specifically informed the court that they were required, since the statements were before the jury, to explore them, but that the prior objections were not waived (Tr. 946-48).

Thus, the "invited error" concept upon which Brown rests, is inapplicable herein. Rather, this case is controlled by the decision

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over, the error in this case, which would require reversal even if the offending testimony had been properly admitted, is rendered that much more egregious by the erroneous ruling of the trial court, discussed previously, in allowing the testimony in the first instance.

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35 cont.
in McCall v. State, supra. In that case, extrajudicial statements of a third party were admitted into evidence, and, as here, the trial court "instructed the jury that they could not consider these statements as in any degree establishing the guilt" of the defendant. 163 So. at 44. However, the prosecutor in that case, as in this case, argued that the alleged non-hearsay statements were in fact true. Id. at 44-45.

This Court held that the argument of the prosecutor, presenting as true evidence which, if given from the stand, would "constitute most convincing evidence of the guilt of the accused", was improper in that "[i]t assumed the existence of evidence against the accused which did not exist in the record as against him." 163 So. at 46. Accordingly, this Court held that prosecutor was "not entitled to argue the extrajudicial statement of [the witness] the same as if it had been evidence given at trial" by him, and granted the accused a new trial. Id.at 46-47. The prejudicial effect of the argument by the prosecutor in this case, referring the jury to "testimony" which would have "constitute[d] most convincing evidence" of the guilt of defendant had it been testified to by the Gibsons, is patent on the record; absent the "invited error" which underlies Brown, reversal is required.

Furthermore, the argument of the prosecutor in this case had other contstitutional ramifications. After arguing that the Gibson statements were true, the prosecutor sought to bolster that improper argument by asserting that the failure of defendant to present the witnesses was proof that their statements were in fact true (Tr. 1186, 1188). Defendant had never represented the Gibsons as necessary witnesses for his case -- although he had, once the State "opened the door", attacked their "testimony" -- and this comment was thus totally improper. Kirk v. State, 227 So.2d 40, 42 (Fla. 4th DCA 1969). Contrast Buckrem v. State, 355 So.2d 111, 112 (Fla. 1978); Brinson v. State, 364 So.2d 66 (Fla. 4th DCA 1978); Weeks v. State, 363 So.2d 176 (Fla. 4th DCA 1978). More importantly, the effect of this comment was to call attention to the fact that defendant had presented no witnesses, including himself; the comment therefore infringed upon the Fifth Amendment privilege of defendant to remain silent at trial. See David v. State, 369 So.2d 943, 944 (Fla. 1979); Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978); Young v. State, 280 So.2d 13 (Fla. 3d DCA 1973); Tolliver v. State, 133 So.2d 565 (Fla. 3d DCA 1961).

A similar situation was considered in United States v. Ragano, 476 F.2d 410 (5th Cir. 1973). In that case, the accused was charged with having falsely declared income recieved from a sale of stock. Id. at 412. He had been questioned by a revenue agent during the course of the investigation; during this interview, the agent recounted to the accused the statements of another individual, S. A. Rizzo, who had been involved in the stock transactions with the accused. Id. at 414-15. These statements by Rizzo, who did not testify at trial, were critical to the central issue of whether the accused had received the stock as a legal fee or in exchange for a promissory note. Id. at 412, 414.

In response to an objection by counsel for the accused, the trial court instructed the jury not to consider the testimony "as going to the truth of the matter of the statement that S.A. Rizzo said", but only to consider it in evaluating the statements of the defendant to the revenue agent. 476 F.2d at 414, n. 6. The trial court in this case, as noted earlier, gave a similar instruction (Tr. 936).

Thus, the tesimony in Ragano was admitted as was the testimony in this case, in the guise of non-hearsay, in connection with statements of the accused to a law enforcement officer. But, as in this case, the accused "flatly denied the truth" of the statements allegedly made by the out-of-court declarant. 476 F.2d at 415. And, as in this case, the prosecutor argued the alleged non-hearsay as substantive evidence of guilt. Id.

On appeal, the Court held that, in light of the denial by the accused of the truth of the statements, those statements were not admissible as non-hearsay. 476 F.2d at 415. The Court further held that this error, combined with the actions of the prosecutor, violated the Confrontation Clause, and required reversal:

> The confrontation clause of the Sixth Amendment is not violated as long as "the declarant is testifying as a witness and subject to full and effective cross-examination." But here Rizzo did not testify, and, of course, was not subject to cross-examination. In short, the prosecutor succeeded in getting Rizzo's testimony before the jury and in exploiting it in his closing argument without calling Rizzo as a witness. 476 F.2d at 415 (citation omitted).[36]

The situation in Ragano is virtually mirrored in this case; the testimony was improperly admitted at the outset, and its prejudicial impact was increased beyond any tolerable level by the grossly improper argument of the prosecutor. A new trial is mandated.

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[36] Significantly, the Ragano decision also rejected the efficacy of the curative instruction given by the trial court in that case:

> . . . Successfully getting Rizzo's statement before the jury was not the result of a passing incident but of a persistent and sustained effort. The court's instruction anticipated an inculpatory response by appellant that did not materialize, and was consequently misdirected. 476 F.2d at 415.

The effort of the prosecutor in this case could be similarly described. But the actions of the trial court in this case cannot be so easily dismissed as merely "misdirected"; the court, in response to the argument of counsel for defendant that defendant had denied the truth of many of the Gibson statements, responded: "I know." (Tr. 932). It thereupon ruled that the statements were nonetheless admissible as non-hearsay (Tr. 934).

> Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable, or indeed any perceptible goals of punishment. 98 S.Ct. at 2984.

Thus, "death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death. . . ." Lockett v. Ohio, supra at 2985 (White, J. concurring).

There is no such finding in this case, nor could there be. The death sentence imposed upon defendant must therefore be vacated.

B. The Improper Admission Of Testimony Not Relevant To Statutory Aggravating Circumstances, The Allowance By The Trial Court Of Improper And Prejudicial Argument On Non-Statutory Aggravating Circumstances, The Erroneous Findings Of The Trial Court Regarding Statutory Aggravating Circumstances, And The Limitations Imposed By The Court Upon Mitigating Circumstances Require That Defendant Be Granted A New Sentencing Hearing.

The record in this case establishes wholesale violations of the most basic principles which govern capital sentencing procedures in Florida by both the trial court and the prosecutor, the result of which was that the sentencing determination of both judge and jury were not and could not have been the product of that "reasoned judgment", State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), which is an absolute constitutional prerequisite to the imposition of the death penalty.

1. The Trial Judge Improperly Applied And Found Aggravating Circumstances In Support Of The Death Penalty.

The trial court found three aggravating circumstances to be applicable: 1) that defendant had previously been convicted of a violent felony, subsection (5)(b); 2) that the homicide was committed during the commission of a burglary, subsection (5)(d); and 3) that the homicide was especially heinous, subsection (5)(h) (R. 183-86). The latter two circumstances, which were obviously highly critical to the determination by the court that death is an appropriate penalty in this case, were improperly applied by the court.

a. felony murder

Even if death as punishment is not per se unconstitutional in pure felony-murder prosecutions, the underlying felony, which will render an otherwise lesser degree of homicide a first-degree murder, cannot be utilized as an aggravating circumstance. It was in this case; although, as noted previously, the State proceeded solely upon a felony-murder theory, the trial court, in imposing the death sentence, found that the homicide was committed during the course of a burglary, and relied upon this fact as establishing an aggravating circumstance under Section 921.141(5)(d), Florida Statutes (1977), which justified the infliction of death (R. 185). The use of the underlying felony, in this case burglary, which rendered the homicide subject to capital punishment in the first instance, as a justification for actually imposing death, violates the Eighth Amendment and

the Due Process Clause of the Fourteenth Amendment.

The analysis must begin with the declaration by this Court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), that the aggravating circumstances specified in Section 921.141(5) are elements of a capital felony:

> The aggravating circumstances. . . actually define those crimes. . . to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

A second aspect of this holding is that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . ." Id. at 9. Accord Stone v. State, 378 So.2d 765, 772 (Fla. 1979); Holmes v. State, 374 So.2d 944, 950 (Fla. 1979); Foster v. State, 369 So.2d 928, 931 (Fla. 1979); Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978).

Under Dixon, when an individual commits a homicide, albeit unintentionally, during the course of one of the felonies enumerated in Section 921.141(5)(d), Florida Statutes (1977), death is automatically presumed the appropriate punishment. In short, felony-murder raises a presumption that the death penalty should be meted out. The irrationality of this presumption renders its application a violation of the Due Process Clause.

While evidentiary presumptions are not per se improper, their application is limited by the Due Process Clause. See Tot v. United States, 319 U.S. 463, 467 (1943); Fitzerald v. State, 339 So.2d 209, 211-12 (Fla. 1976); Jefferson v. Sweat, 76 So.2d

494, 497 (Fla. 1954). The "ultimate test" for the validity of a presumption that an element of a crime exists is whether it "undermine[s] the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." County Court of Ulster County v. Allen, ___U.S.___, 99 S.Ct. 2213, 2224 (1979).[46]

It is clear that the presumption announced in Dixon is mandatory -- the very language utilized by this Court in that decision places it in that category: "death is presumed to be proper sentence" when one or more aggravating circumstances is found, "unless it or they are overridden" by mitigating circumstances. 283 So.2d at 9. Accordingly, for the presumption that

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[46] The application of this "ultimate test" turns upon the nature of the presumption -- whether it is "permissive" or "mandatory". A "permissive" presumption, one "which allows -- but does not require -- the trier of fact to infer the elemental fact from proof. . . of the basic one", County Court of Ulster County v. Allen, supra at 2224, is valid if "the presumed fact is more likely than not to flow from the proved fact". Leary v. United States, 395 U.S. 6, 36 (1969); Fitzgerald v. State, supra, at 212. See also Barnes v. United States, 412 U.S. 837 (1973); United States v. Gainey, 380 U.S. 63 (1965); State v. Kahler, 232 So.2d 166 (Fla. 1970).

However, if the presumption is "mandatory", that is, one upon which the trier of fact "must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence", it is constitutionally infirm "unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." County Court of Ulster County v. Allen, supra at 2224-25, 2229. The classification of a presumption as permissive or mandatory turns upon whether it merely gives "rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion. . . . [which] could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal." Id. at 2226-27 (footnote omitted).

death is appropriate in a felony-murder case to be valid, it must satisfy the "reasonable doubt" test announced in County Court of Ulster County v. Allen, supra.

Under the reasonable doubt test, "the analysis of the presumption's constitutional validity is . . . based on the presumption's accuracy in the run of cases." County Court of Ulster County v. Allen, supra at 2226. That the death penalty has not historically been imposed in pure felony-murder cases, as previously established, proves that the presumption is not accurate -- the "fact proved", felony-murder, is not sufficient to support the inference that death is the proper punishment "beyond a reasonable doubt." County Court of Ulster County v. Allen, supra at 2229.[47]

The irrationality of the presumption that death is an appropriate punishment for an unintentional felony-murder also has Eighth Amendment ramifications. Generally, a presumption that death is warranted, based solely upon a conviction for a "capital" crime, is violative of the Eighth Amendment. See Woodson v. North Carolina, 428 U.S. 280 (1976); Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Purdy v. State, 343 So.2d 4,

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[47] The irrationality of the presumption is further established by the fact that, under Section 921.141, Florida Statutes (1977), an individual who unintentionally commits a homicide during the course of one of the felonies enumerated in subsection (5)(d) automatically has one "built-in" aggravating circumstance, while an individual who commits a deliberate murder, generally considered the only offense for which the death penalty may be properly considered as punishment under the Eighth Amendment, see Gregg v. Georgia, 428 U.S. 153, 187 (1976), "will not be similarly disadvantaged." Provence v. State, 337 So.2d 783, 786 (Fla. 1976).

6 (Fla. 1977). But that proscription is of even more compelling tenor when the presumption is neither legally nor logically sound -- and it mandates the conclusion that not only can the fact of an unintentional felony-murder not give rise to a presumption that death is the proper punishment, but that the underlying felony cannot be utilized as a justification for inflicting death.

The Supreme Court of North Carolina has reached this precise conclusion in construing its capital sentencing statute, which is in all pertinent respects parallel to the Florida statute. See State v. Cherry 298 N.C. 86, 257 S.E.2d 551 (1979). In Cherry, as in this case, the first-degree murder conviction was based solely upon a felony-murder theory, and, as in this case, the underlying felony was utilized as an aggravating circumstance to justify the imposition of the death penalty. 257 S.E.2d at 567. In North Carolina, as in Florida, see State v. Pinder, 375 So.2d 836 (Fla. 1979), the underlying felony which gives rise to a first-degree felony-murder conviction "becomes part of the murder charge". Id. (citations omitted).

The Cherry Court held that the policy underlying this rule, in combination with the simple unfairness of penalizing the individual who commits an unintentional homicide more than one who commits a deliberate murder, requires that the underlying felony which gives rise to a first-degree murder conviction in a pure felony-murder case cannot additionally be utilized to justify the imposition of the death penalty:

> . . . Neither do we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.
>
> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony-murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury the aggravating circumstance concerning the underlying felony. 257 S.E.2d at 567-68.[48]

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[48] The double punishment rationale which underpins the Cherry decision is mirrored in Florida law; as established by the decision of this Court in State v. Pinder, supra, the prohibition against double punishment, embodied in the Double Jeopardy Clause of the Fifth Amendment and Article I, Section 9 of the Constitution of the State of Florida, prohibits conviction and punishment for the underlying felony where an accused is convicted of first-degree murder based solely upon a felony-murder theory. Accord Mahaun v. State, 377 So.2d 1158, 1160-61 (Fla. 1979). See also Harris v. Oklahoma, 433 U.S. 682 (1977); Brown v. Ohio, 432 U.S. 161 (1977); Blockburger v. United States, 284 U.S. 299 (1932); Morgan v. Devine, 237 U.S. 632 (1915); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874). This same concept must forbid doubly punishing an individual for felony-murder -- once, by a conviction for first-degree murder, and again, by using it as a reason for imposing death.

Indeed, this concept is no stranger to Florida sentencing law for non-capital crimes. Section 775.087(1), Florida Statutes (1979) provides for the reclassification of felonies which are committed with the use of a weapon, and thus for the imposition of a greater penalty; however, it specifically exempts those felonies "in which the use of a weapon or firearm is an essential element". Therefore, where the use of a weapon is an essential element, i.e. in a prosecution for aggravated battery with the use of a weapon, the individual, having once been punished for the use of the weapon by the conviction itself, may not be punished a second time under Section 775.087(1). See Knight v. State, 374 So.2d 1065, 1067 n. 2 (Fla. 3d DCA 1979). If this prohibition is valid in a non-capital case, certainly, where life is at stake, it should apply with equal, if not greater, force.

But for the underlying felony, defendant would not be guilty of first-degree murder. The factor which raised the unintentional homicide in this case to the level of a capital crime cannot also be used as a reason to inflict death.

b. especially heinous

Section 921.141(5)(h) establishes, as a potential aggravating circumstance, that "[t]he capital felony was especially heinous, atrocious, or cruel." As the Supreme Court of the United States has recently observed in passing upon the validity of a similar provision in the Georgia death penalty law:

> . . . There is nothing in these few words, standing alone, that implies any inherent restriction on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horible and inhuman." Godfrey v. Georgia, ___ U.S. ___, 27 Cr.L. 3115, 3118 (1980), opinion filed May 19, 1980.

Rather, the validity of this provision must turn upon the interpretation given it by the appropriate state court. Id.

In State v. Dixon, supra, this Court interpreted subsection (5)(h) as including crimes which are "outrageously wicked and vile", 283 So.2d at 9; under Godfrey, this no limitation at all. The critical limitation on the application of this aggravating circumstance is therefore the provision in Dixon which purports to narrow its scope:

> . . . What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm or capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim. 283 So.2d at 9.

Accord Riley v. State, 366 So.2d 19, 21 (Fla. 1978); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976).

Any application of subsection (5)(h) beyond this limited scope renders that aggravating circumstance unconstitutionally vague and overbroad. Godfrey v. Georgia, supra. Thus, this circumstance must be limited to those cases in which the method by which the homicide was perpetrated was unnecessarily tortuous or depraved -- the "additional acts" must be the focus. Godfrey v. Georgia, supra.[49] The trial court in this case allowed the State to deviate from this strictly demarcated aggravating circumstance, and to introduce irrelevant and inflammatory testimony in the guise of proving its applicability.

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> . . . It is apparent that all killings are heinous -- the members of our society have deemed the intentional and unjustifiable taking of human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime that is "especially heinous" -- "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Lewis v. State, 377 So.2d 640, 646 (Fla. 1979).

Accord Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

See, e.g. Foster v. State, 369 So.2d 928, 931 (Fla. 1979) (defendant cut throat of victim, dragged him into undergrowth, and returned to cut his spine); Smith v. State, 365 So.2d 704, 706-07 (Fla. 1978)(defendant forced victim into trunk of car at knifepoint, drove to secluded location, opened trunk and beat victim with a tire iron, saturated car with gasoline, and burned victim to death); Hoy v. State, 353 So.2d 826, 833 (Fla. 1977)(defendant and accomplice raped young girl in presence of her fiance, killed him in her presence, shot her twice, raped her a second time, and then killed her); Adams v. State, 341 So.2d 765, 769 (Fla. 1976)(victim murdered by beating him "past the point of submission and until his body was grossly mangled); Henry v. State, 328 So.2d 430, 431 (Fla. 1976)(victim bound and gagged, blunt trauma inflicted on face and head, deep razor cuts inflicted upon neck); Gardner v. State, 313 So.2d 675, 676 (Fla. 1975)(victim suffered approximately one hundred bruises to body, sexual mutilation, and massive hemorrhages of the head).

In an ostensible effort to establish that the homicide in this case was "especially heinous, atrocious and cruel" the State presented the testimony of a medical examiner, Dr. Wright (Tr. 1311-14).[50] Dr. Wright testified that the wound which had been inflicted upon the victim would have cause him "considerable" pain, and that he would have been conscious prior to his death, and aware of pain (Tr. 1319-22). Objections to this testimony on the ground that it was not relevant to whether the homicide was within the purview of subsection (5)(h) were overruled (Tr. 1311-14).

The testimony was clearly irrelevant. The unfortunate fact that a victim suffers pain prior to death does not in and of itself render a homicide especially heinous. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).[51] Rather, as stated above, the focus is on

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[50] Dr. Wright was not the medical examiner who performed the autopsy upon the victim (Tr. 753-60, 1316). The prosecutor, in response to an objection to the testimony of Dr. Wright on this ground, stated that the original medical examiner was "out of the country", and that Dr. Wright would testify to "the amount of suffering that the victim did suffer", based upon his review of the notes which had been taken by the medical examiner who performed the autopsy (Tr. 1303). Dr. Wright, on voir dire examination, testified that his testimony would be based on his review of the autopsy report and the photographs which had been prepared by the original medical examiner (Tr. 1312). The trial court overruled the objection on this ground, and allowed Dr. Wright to testify (Tr. 1312).

[51] In Tedder, the accused shot his mother-in-law, and "then abandoned his victim and prevented the only persons present from providing aid." 322 So.2d at 909, 910. The victim perished on the following day. Id.

This Court, in holding that the killing was not within subsection (5)(h), expressed the principle which controls in this case:

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we

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the acts of the accused. State v. Dixon, supra. The testimony of Dr. Wright was therefore inadmissible.

The prejudicial impact of that testimony is patent. And it was intolerably exacerbated by the refusal of the trial court to give an instruction requested by counsel for defendant which would have ameliorated the prejudicial effect of the testimony; counsel requested the court to instruct the jury, pursuant to the express language of Dixon, that subsection (5)(h) applies "only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies" (SR 8). The court refused to give this instruction (SR. 8; Tr. 1386-87), in direct contravention of the rule announced by this Court in Cooper v. State, supra:

> Of course, a proper instruction defining the terms "especially heinous, atrocious or cruel", or any other listed circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required. 336 So.2d at 1140.

It would have been inappropriate, in any case, for the trial court to refuse to give an instruction which tracks the definition announced by this Court in Dixon -- but in this case, where such an instruction was absolutely essential to protect against improper considerations being insinuated into the delicate weighing process

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51 cont.

> believe that the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder. Id. at 910 (footnote omitted).

to be performed by the jury, it was clearly error. See Godfrev v. Georgia, ___U.S.___, 27 Cr.L. 3115, 3118 (1980), opinion filed May 19, 1980. And that error was further compounded by the findings of the trial court, which, consistent with its refusal to give the requested instruction, reflect a misunderstanding of proper scope of subsection (5)(h).

The court, which was "required to view the issue of life or death within the framework of rules provided by the statute", State v. Dixon, supra at 8, was greatly influenced by the inadmissible testimony of Dr. Wright. In finding that subsection (5)(h) was applicable, the court relied in great part upon the "pain and suffering" detailed in his testimony (R. 186); indeed, this factor was of significant import in the determination of the court that death was an appropriate punishment.[52] In the absence of a proper

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[52] The trial court also relied upon two additional factors, neither of which properly establishes that the homicide was especially heinous. First, the court found that defendant had approached the victim "and began stabbing and slashing with the knife" (R. 186). While a torn pillowcase found on the bed may be indicative of such "stabbing and slashing" (Tr. 641-42, 646-49), the fact remains that but a single stab wound was inflicted upon the victim, resulting in his death. This does not constitute an "especially heinous" crime. See Lewis v. State, supra; Provence v. State, supra; Tedder v. State, supra; State v. Dixon, supra.

The second additional factor relied upon by the court was that defendant had also stabbed the companion of the victim, Carol Meoni (R. 186). Defendant was acquitted of the assault upon Meoni (R. 155). The principle of collateral estoppel, embodied in the Double Jeopardy Clause, prohibited consideration this "fact" as an aggravating circumstance. See Ashe v. Swenson, 397 U.S. 436 (1970); State v. Perkins, 349 So.2d 161 (Fla. 1979). Additionally, even if defendant had not been acquitted, the trial court could not have relied upon the alleged assault upon Meoni as giving rise to a statutory aggravating circumstance. See Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979).

The prosecutor, like the trial court, relied upon the the assault on Meoni in arguing that death was a proper punishment (Tr. 1426-27); it was just as improper for the prosecutor to inject this

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basis for the invocation of subsection (5)(h), the finding of the court was improper -- and, in light of its obvious influence upon the court in its determination that death was an appropriate punishment, a new sentencing hearing is required. See Fleming v. State, 374 So.2d 954, 958-59 (Fla. 1979); Lucas v. State, supra.

2. The Trial Court Allowed The Prosecutor To Argue Non-Statutory Aggravating Circumstances To The Jury As A Basis For A Death Recommendation.

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52 cont.
factor into the jury deliberations as it was for the court to consider it. But the prosecutor went beyond this, and reprised the grossly improper argument which he had made during the guilt phase of the trial regarding the mythical rape which defendant had supposedly intended; this argument, which was prejudicial in the guilt phase, see Point IV, supra, was yet more prejudicial and insidious during the sentencing phase.

The prosecutor was aware, prior to his closing argument, that the trial court intended to instruct the jury pursuant to "doubling up" rule announced by this Court in Provence v. State, 337 So.2d 783, 786 (Fla. 1976), which would have prohibited the jury from considering both subsection (5)(d) and subsection (5)(f), that the homicide was committed for pecuniary gain (Tr. 1387, SR. 16). In a blatant attempt to nonetheless have the jury apply both aggravating circumstances the prosecutor repeated his prior improper argument, and urged the jury to apply both circumstances by finding that the defendant had intended to commit a sexual battery upon Meoni at the time of the burglary (Tr. 1429-30). An objection to this argument was overruled, and a motion for mistrial was denied (Tr. 1429-30, 1466-67).

As noted previously, see Point V, supra, there was absolutely no evidence to support this claim. And, of course, defendant was not charged with sexual battery upon Meoni or with burglary with an intent to accomplish a sexual battery. Cf. Presnell v. Georgia, 439 U.S. 14 (1978). Thus, although the court did instruct the jury pursuant to Provence (Tr. 1463), there exists a very real possibility that the jury, based upon the repeated urgings of the prosecutor that a sexual battery had been intended by defendant and the fact that objections to these claims were overruled by the court in the presence of the jury, could have applied both aggravating circumstances in this case. Under the facts of this case, Provence required that only one could be considered, and the prejudice to defendant from the arguments of the prosecutor is obvious.